The Islamic Institution of
MAHR

A Study of its Philosophy, Working & Related Legislations in the Contemporary World

Dr. M. Afzal Wani

PREFACE

"Frailty, thy name is woman". The line, whoever has shaped it, sounds its note in comparison to the presumed strength of men. But, when it is seen in the Quranic legal perspective one is really caught in a dilemma. The Quran describes man and woman as each others "garment" and "potential" with equitable position before law. It embodies a comprehensive set of rules and guidelines ensuring women a position of honour at home and a place of reverence in the society at large. Yet there is another side of the coin. A study of the human history reveals that many people, at different places in the world at different times, labelled woman as a 'devil', 'impure-being' and a 'witch'. In many countries, termed as civilized now, she remained till the beginning of the present century on the list of interdicted persons under their respective legal systems. Seen in this perspective the author of the 'opening line' above wins full appreciation. This is, however, clear that in the context of Muslim women the problem is not of the conferment of rights but that of educating them about and the enforcement of their rights. The need, therefore, is that the Muslim women and men must realize that the glorious Islamic laws have fallen into disuse due to their own ignorance and to their own detriment. Allah, through the Quranic message, invites all the people again and again to think and ponder over things.

The closest and the most vital relationship between a man and a woman is developed by marriage. On marriage under Islamic Law, the man (bridegroom) is bound to present a suitable gift out of his property to the woman (bride) with a willing heart showing respect for her right to earn, own and possess property independently and to enjoy an equitable position on the matrimonial dais. This gift is popularly known as *mahr*. How many Muslim women do actually know the nature and significance of this right and how many of them do really receive this gift property from their husbands are the questions that are gaining importance day by day in view of the "modernization" of laws by most of the societies in the world. The practice around us we know is, if not altogether discouraging, but very poor. The situation invites a thorough investigation and appraisal.

The present study considers the following originating questions regarding the nature, object and working of the institution of *mahr* in Islamic law:

a) Why this institution has been Divinely ordained and juristically recognized by Islam?

b) What is the true nature of *mahr*? Whether various jurists of Muslim law and the judiciary have ever tried to explore the real nature of *mahr* or not?
c) Does the functioning of the institution of *mahr* have any impact on the other institutions of life, viz, family and society?
d) Does it in any way supplement the laws relating to marriage, divorce, maintenance and inheritance for the purpose of justice? If so, how?
e) What is the present state of affairs as regards its enforcement and workability in the existing socio-economic conditions in the Sub-Continent and abroad?
f) To what extent has the codification of laws regarding *mahr* taken place in the Sub-Continent and elsewhere in the world?
g) How and to what extent have the customs and common tendencies of the people of different places in the world hindered the working of this egalitarian Islamic institution with its Divinely set goals like gender-justice and fair-treatment of all?

While this study examines the above points, the general focus of the thesis has been on finding out the rationale of *mahr* in the light of the Quran and Hadith. Such an endeavour is highly required in view of the differing juristic assertions about the nature and purpose of *mahr*. Some have said that *mahr* is a consideration for marriage while as others have described it as a mark of respect for women. It has, however, been also treated as a stabilizer for marital relations. This thesis puts a gloss on these views with necessary references to the Quranic provisions and *ahadith*. Moreover, this study helps to assess as to what extent the essence and expected role of *mahr* has been understood, carried out and its purpose has actually been met with in the Islamic society. Besides, the relevant laws on *mahr*, at home and abroad, have been assessed to mark the legislative and judicial responses and the emerging trends about its working.

Additionally, to understand how and to what extent have the customary practices and other local conditions influenced the working of the institution of *mahr* in different parts of the world, the study includes, by way of sample, an actual examination of the practices prevalent and usefulness of *mahr* in Kashmir Valley, (most of the Asian and African regions present a similar view of things). Impact of modern legislations on this institution has also been studied. Lastly, some suggestions have been articulated as to what steps should be taken for the promotion of this healthy institution. The detailed plan of study is as follows:-

i) Chapter-I gives the concept of *mahr* and explains various un-Islamic concepts confused for *mahr*.
ii) Chapter-II has been devoted to the study of the origin and development of the law on *mahr* with reference to theQuranic directives, practices of the Prophet (S.A.W.) and the later developments.

iii) Chapter-III deals with the subject-matter of *mahr* and its quantum in the light of *ahadith* and common usages and practices. Impact of modern legislations on the amount of *mahr* has also been considered herein.
iv) Chapter-IV is a study of the time and modes of payment of *mahr*.
v) Chapter-V enumerates the situations when *mahr* is not payable to the wife. With this the validity and effects of the relinquishment of *mahr* by the wife have also been discussed.
vi) Chapter-VI incorporates the principles of Islamic law and a detailed account of judicial precedents about the nature and scope of the widowed women's claim to *mahr* especially the "widow's right of retention".
vii) Chapter-VII is an endeavour to determine the extent of the entitlement of the divorced women to *mahr* in cases of extra-judicial as well as judicial divorces. Differences and the inter-relationships between *mata'*, *mahr* and *nafaqah* have also been high-lighted.
viii) Chapter VIII gives a review of the statutory laws related to *mahr* in Muslim countries with reference to the relevant classical law.

In the concluding chapter the impressions from the various findings in this study have been stated and some suggestions have accordingly been articulated to make the institution of *mahr* useful for the Muslim society in general and the Muslim women in particular.

As regards methodology, this study is primarily based on fundamental sources of Islamic, law, viz. The Quran, Hadith and Juristic works in English, Urdu and Arabic languages. Journals, books and the reports have been used for assessing the present legislative and judicial trends in India and Muslim countries. Important Privy Council, Supreme Court and High Court decisions on the subject have been analyzed to examine, identify and spell out the mis-conceptions and inconsistencies that have crept in into the understanding of the institution of *mahr*. For studying the working and usefulness of the institution of *mahr* in Kashmir Valley relevant statutes and local digests have been consulted. However, mainly the reliance has been placed on the results of interviews and questionnaires.

This work, on which the University of Kashmir awarded me a doctoral degree, was initially taken in hand with the generous help of Professor Tahir Mahmood, Dean, Faculty of Law, Delhi University, who guided me in the selection of the topic and preparation of the basic plan of study. Profoundly, I record the gratitude, I owe to him for his meticulous guiding dictates and kind treatment. His analytical approach has been a source of inspiration for me.

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M. Afzal Wani

Kashmir University
Srinagar-6
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Chapter - I

INTRODUCTION

1. Meaning of *Mahr*: an etymological survey

Islam ordains a 'gift spontaneous', popularly known as *mahr*, to be given by the husband to the wife merely because marriage has taken place between the two. It has a solid Quranic base confirmed by the *Sunnah* of the Prophet (S.A.W.). But there exists a great deal of conflict and confusion in various writings about *mahr* which seem to fail in giving a clear understanding of its concept, social significance and the rationale behind its legal enforceability. In this situation a macro-level etymological survey of the expression *mahr* is most requisite. Without such a survey it would be impossible to find a basis for marking the magnitude and measuring the parameters of this Islamic Institution.

In its origin the expression *mahr* is of multiple usage and connotation. *Mahr* as noun with Arabic origin stands for what becomes due as a gift by the husband to the wife on marriage. *Mahur* (pl. of *mahr*) is also used for 'marriage-portion' or a gift to the wife because of the fact of marriage[1]

Francis Johnson describes *mahr* as follows:

> *Mahr* (v.n. of مَهَرَ) indicates contracting; fixing of *mahr*; paying of *mahr* or making settlement on wife; and excelling in art or profession. It also means 'going on the right way', e.g., *'Lam taâtah hazal amral maharatah'*-you have not gone the right way in this matter.[2].

In its broader perspective *mahr* includes:

i) something lovable, or things having reference to love as a bone in the upper part of the breast, joints of the breast; or

gristles of the ribs; or something presentable as a gift like a pearl; and

ii) doing of something in the right way and with skill[3].

Mehr (origin: Persian) means kindness, favour, love, affection (noun, feminine) and Sun (noun, masculine)[4]

a) **Quranic phraseology**

The Quran makes the ordainment of *mahr* in its own peculiar terms. It nowhere uses the word *mahr*. Term *mahr* has been used by *Mufassirin* (exegetical commentators), *Fuqaha* (Jurists) and by the majority of Muslims all over the world. The use of the term *mahr* in *ahadith* is found to be very rare. The question is, Why the term *mahr* is widely used in *fiqh* when it has not been used in the Quran. This is probably due to the common use of this term in pre-Islamic Arabia[5]. However, it is to be noted, that the term *mahr* in Islamic *fiqh* does not have the same meaning and connotation it had in the pre-Islamic period. The term *mahr* has undergone total metamorphosis after taking on the colour from Quranic terms as will be evident from the following exposition of the relevant expressions. This is a strong instance of social transformation by Islam. Islam does not blindly disapprove or abolish an institution or system by way of reaction but does sanely bring about modifications in social institutions. In this process the evil becomes clearly visible, discernible and, of course, extinct. This protects the good and abolishes the evil not, otherwise, possible in a mere reactionary process. For *mahr* the Quran uses the following terms:

i) *Saduqah (Saduqati hinna)*[6]
ii) *Ajr (Ajura-hunna)*[7]
iii) *Fariezah (Lahunna'fariezah)*[8]

All the *Muffassirin* in their versions, have described these terms as *mahr*. Short texts and relevant excerpts from *Tafasir* are given below:

i) *Saduqah*: وَآتُوا النِّسَاءَ صَدُقَاتِهِنَّ نِحْلَةً ٩

And give the women (on marriage) their 'dower'[10] as a free gift;
(Abdullah Yusuf Ali)[11]

Give *mahr* to your wives with a willing heart.
(Ibh Kathir)[12]

Ibn Kathir also reports Abu Saleh (RA) saying:

Earlier people took the *mahr* of their daughters themselves but this verse was revealed to stop them enjoining its actual delivery to the wife herself.[13]

This shows that the term *Saduqat* stands for *mahr*.

And you give *mahr* to the women with a willing heart.
(Maulana Ashraf Ali Thanvi)[14]

And give *mahr* to the women with a willing heart (considering it as obligatory)
(Syed Abul A'la)[15]

And give to the women on marriage '*Saduqatihinna*' (Plural of *Saduqat*) with *Fatah* on ص (S) and *Dhamma* on د (d), the *saduqah* meaning *mahr*.
(*Tafsir Rooh al M'ani*)[16]

Thus the *Mufassirin* have, for saduqah (صدقه) used the common expression, *mahr* مهر and for term *Saduqatihinna* the *mahurahunna* (their *mahr*).[17].

ii) *Ajr* اجر pl. *Ajur* اجور

فَآتُوهُنَّ أُجُورَهُنَّ فَرِيضَةً ٢٤

Give them their 'dowers'; (at least) as prescribed.
(Abdullah Yusuf Ali)[19]

Give them their settled *mahr*.
(Ibn-Kathir)[20]

So give them their *mahr* which has been settled.
(Maulana Thanvi)[21]

Discharge their *mahr* as prescribed to be obligatory.
(Syed Abul A'la)[22]

23 وَاٰتُوْهُنَّ اُجُوْرَهُنَّ بِالْمَعْرُوْفِ

Give them their 'dowers' according to what is reasonable.
(Abdullah Yusuf Ali)[24]

And give their *mahr* according to established order.
(Ibn Kathir)[25]

And keep them giving *mahr* in conformity with the established order.
(Maulana Thanvi)[26]

And discharge their *mahr* in the reasonable way.
(Syed Abul A'la)[27]

28 اِذَآ اٰتَيْتُمُوْهُنَّ اُجُوْرَهُنَّ

When ye give them their 'dowers'.
(Abdullah Yusuf Ali)[29]

Ye discharge their *mahr*...[30]

Ye give them their recompense, i.e. *mahr* be given not merely as a condition but as an obligation.
(Maulana Thanvi)[31]

After ye discharge their *mahr*.
(Syed Abul A'la)[32]

33 اٰتَيْتَ اُجُوْرَهُنَّ

To whom thou hast paid their 'dowers'.
(Abdullah Yusuf Ali)[34]

To whom ye have given their *mahr*.
(Ibn Kathir)[35]

To whom you have given their *mahr*.
(Maulana Thanvi)[36]

Whose *mahr* ye have discharged.
(Syed Abul A'la)[37]

38 اِذَآ اٰتَيْتُمُوْهُنَّ اُجُوْرَهُنَّ

On payment of their 'dowers'
(Abdullah Yusuf Ali)[39]

After giving them their *mahr*.
(Ibn Kathir)[40]

While ye defray their *mahr* to them.
(Maulana Thanvi)[41]

Provided ye pay their *mahr* to them.
(Syed Abul A'la)[42]

iii) *Fariezah*

43 اَوْ تَفْرِضُوْا لَهُنَّ فَرِيْضَةً

Or before the fixation of their 'dower'.
(Abdullah Yusuf Ali)[44]

And without fixation of *mahr*.
(Ibn Kathir)[45]

And no *mahr* has been fixed for them.
(Maulana Thanvi)[46]

Or (before) *mahr* has been fixed.
(Syed Abul A'la)[47]

48 وَقَدْ فَرَضْتُمْ لَهُنَّ فَرِيْضَةً

But after the fixation of a 'dower'; for them,
(Abdullah Yusuf Ali)[49]

And ye have fixed their *mahr* also.
(Ibn Kathir)[50]

And some *mahr* had been fixed for them.
(Maulana Thanvi)[51]

But *mahr* has been fixed.
(Syed Abul A'la)[52]

b) **Terms used in ahadith and other works (Excerpts)**

أَنَّ رَسُوْلَ اللهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ أَعْتَقَ صَفِيَّةَ وَجَعَلَ عِتْقَهَا صَدَاقَهَا

Allah's Messenger manumitted Safiyyah and regarded her manumission as her *mahr*.[53]

أَنَّ رَسُوْلَ اللهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ نَهَى عَنِ الشِّغَارِ وَالشِّغَارُ أَنْ يُزَوِّجَ الرَّجُلُ ابْنَتَهُ عَلَى أَنْ يُزَوِّجَهُ الْآخَرُ ابْنَتَهُ لَيْسَ بَيْنَهُمَا صَدَاقٌ

Allah's Messenger forbade *al-shighar* which means that somebody gets his daughter married to somebody else, and the latter gets his daughter married to the former without paying *mahr*.[54]

هَلْ عِنْدَكَ مِنْ شَيْءٍ تُصْدِقُهَا ؟

Have you got anything to pay her mahr.[55]

التَّزْوِيْجِ الْقُرْآنِ وَبِغَيْرِ صَدَاقٍ

To marry (a lady to) a man for what he knows of the Quran (by heart) and without paying (any other thing as) *mahr*.[56]

أَلْمَهْرِ بِالْعُرْسِ .....

To give *mahr* in the form of material things.[57]

سَأَلَ النَّبِيُّ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ عَبْدَ الرَّحْمٰنِ بْنَ عَوْفٍ
وَتَزَوَّجَ امْرَأَةً مِنَ الْأَنْصَارِ: كَمْ أَصْدَقْتَهَا ؟

When Abdur-Rehman bin Auf married an Ansari woman, the Prophet(S.A.W), asked him, How much *mahr* did you give her?[58].

Thus in *ahadith* also, originally, the expression *saduqah* is found in use in abundance but the commentators and the translators have used the common expression *mahr*.

To have an appraisal of some other substitute terms the following excerpts from various works are reported:

Sadaq(صداق) *Sadaqah* (صَدَقَة) *Nihlah* (نحلة) *Ati iah'*(عطية) and *Uqr'* (عقر) are all the names of *mahr*. And *Ajr* (اجر), *alaʾiq*(علائق) *Habba* (حبّ) and *Fariezah* (فَرِيْضَة) are also called as *mahr*.[59]

Sadaqatun ("صَدَقَة Pl. صَدَقَاتٌ) means only such a gift that invokes only pleasure of Allah and not personal glorification. *Al-Sadaqatu* (الصَّدَقَة) *al Sad qatu* (الصَّدْقَة) *al-Saduqatu* (الصُّدُقَة) *al-Sud qatu* (الصُّدْقَة) all have the same meaning. This also means *mahr* given to women on marriage.[60].

The Quran has used the expression *Saduqatun* (صَدُقَاتٌ) and *Ujurun* (أُجُوْرٌ) for *mahr*[61].

Mahr (pl. *mahur* مہور); is termed as: Persian, *kabin-e-zann* (کابین زن) Ahmad Nagri, *dasturul ulema* (دستورالعلماء3:1389). Arabic (i) *al-nihlah* (نحلة) (ii) *al-sadaq* (الصَّدَاق) (iii) *al-uqr* (العقر) iv) *al-ajr* (الاجرة) (v) *al-saduqah* (الصَّدُقَة); *al-alaʾiq* (العلائق) *al-habba'* (الحبا) and *al-fariezah* (الفريضة) --- but only word *mahr* (مہر)'is in common use[62].

(c) **Literal meaning of the terms used in the Quran and ahadith for *mahr***

The meaning of the Quranic terms *saduqah*, *nihlah*, *ajr'* and *farieza* is made clear by the following excerpts from the *lugat* and other works:

(i) *Saduqah*:

Saduqah is a derivative of *Sadaq*, written by some as *Sadk*. Following excerpts from the *lugat* help to know its literal meaning:

Sadk (v.n. of صدق) speaking the truth, being true, just, honest, upright ... *Sidk*,. truth, veracity, sincerity, praise.[63]
(صدقاء)*Sudaka*, (pl.صديق *Sadiq*) True, just sincere friend. (صدقات) *Sudkat, Sudakat* and *Sudukat*, (pl. صدقه) *Sudkat*, marriage portion, (صداق) *Sadaq or sidk (pl.* صدق *Sudk). and Suduk*. A marriage settlement, a portion which the hus-

band engages to give to his future wife. *Sidak* (v.n. 3 of صدق) cultivating friendship. Sincere and mutual friendship[64].

Saduqat صُدُقات (pl. of *saduqah* صَدُقَةٌ) means *mahr*. Sidq (صدق): Truth, veracity, rectitude, honesty; uprightness, truthfulness, good name *Sadaqa* is the origin of *Yasduqa* which means speaking the truth and manifestation of truth by deeds[65].

Sidq (صدق) (1) Truth; (2) Correctness, rectitude; good fortune, felicity, auspiciousness e.g.

وَبَشِّرِ الَّذِينَ آمَنُوا أَنَّ لَهُمْ قَدَمَ صِدْقٍ عِندَ رَبِّهِمْ

"And give the good news to the Believers that they have before their Lord the Lofty rank of Truth"[66].

According to Imam Raghib Isfahani[67] *Sidq* (صدق) and *Kizb* (کذب) both are, in reality, utterances – past or future – promise or no promise. These give some information. Directly these are not used in any other genre of literature. Their use is made like this:

وَمَنْ أَصْدَقُ مِنَ اللَّهِ قِيلًا

Whose word is more 'truthful' than that of Allah

إِنَّهُ كَانَ صَادِقَ الْوَعْدِ

He was 'true' to his word.

Also *Sidq* means conscience (or, inner moral guide). It is sometimes used to express one's degree of commitment towards an object, such as, *Sadaqa fi-al Qatal* (He has done all that he was supposed to do in the battlefield)[68]. That is *Sadaqah* includes unity of thought and action and it is the expression of situation as per the reality[69]. The word *Sadq*, صدق therefore, applies to every such object as is in appearance as well as in reality graceful, honoured, exalted. It is said:[70].

Honourable body; مَقْعَدَ صِدْقٍ (معزز مجلس)
and
Honourable rank, position قَدَمَ صِدْقٍ (معزز مرتبہ)

ii) *Nihlah* نحلہ

نحلہ *nahlat*, a bee, *nihlat* or *nuhlat*, an appointment of a marriage portion, a gift, of one's own accord, voluntarily[71] .. Granting to a woman her marriage gift voluntarily.[72]

al-nihlatan and *al-nuhlata* means that gift which is given without any compensation or consideration .. *al-ata'-bilafuz*, (gift without any consideration.)[73]

Taju'l'Urus and *Ibn Faras* have written the same meaning of *al-nahlu* (اَلنَّحْلُ). This indicates a 'gift' - spontaneous, with no idea of compensation or consideration. Imam Raghib has written that النِّحْلَةُ (*al-nihlatu* is a derivative of نَحْلٌ (nahlun). That is, as a honey bee gives without any consideration, the useful and sweet honey, it is in the same manner that نِحْلَةً *nihlatun* is that pleasant and sweet gift given to women willingly and gladly without any diea of compensation.[74]

iii) *Ajr* اجر

Ajr (اجر) is Actually a word of Akkadian language (عقادی زبان) which has been assimilated by Arabic language through Arami language (آرامی زبان). This is used in two senses. Both the uses of the term are found in the Quran:[75]

i) It is used for expressing the reward that will be given for virtuous deeds in the hereafter; (e.g. وَلَأَجْرُ الْآخِرَةِ أَكْبَرُ لَوْ كَانُوا يَعْلَمُونَ)- but truely the *ajr*'. i.e. reward of the hereafter will be greater, if they only realize (this)[76];

ii) During the time of the Prophet, صلی اللہ علیہ وسلم it was used to mean 'recompense'. In the Quran it is used for 'recompense' as well as *mahr*. e.g.

77 فَإِنْ أَرْضَعْنَ لَكُمْ فَآتُوهُنَّ أُجُورَهُنَّ

If they suckle your (offspring) give them their recompense.

78 وَآتُوهُنَّ أُجُورَهُنَّ

And give them their *mahr*.

The correct use of the term *ajr'* is explained by the following lines:

> *Ujurun* أُجُورٌ (pl. of *ajrun* أَجْرٌ) according to Ibn Faras basically means joining of a broken bone. It is for this reason that the remuneration given to a labourer is called *ajrun* (أَجْرٌ). It heals up the wounds of labour and joins the broken bones. The gift or *mahr* given to the women on marriage is called *ajr* (اجر) because it is given to wife to bear with some pleasantry the agony of separation from parental home which every woman suffers and to face the disquietude of usual apprehensions about the new matrimonial life. She is tied up to the new home with a gift spontaneous so that she becomes gladly familiar with the new life.[79]

Francis Johnson also makes a mention of the meaning of the word *ajr'* as :

> Restoring, healing (a broken or dislocated joint). Being this restored. Honourable mention[80].

iv) *Fariezah* فَرِيضَةً *means:mahr, al-Sadaq* (as said by Ibn. Abbas);[81]; ordainment; an ordinance of Allah; an indispensable religious or legal duty; a fixed portion; *mahr* of women.[82].

It is for this reason that the rule has been established that *mahr* is obligatory for every marriage even if no mention of it is made at the time of marriage[83].

2. Nature of *mahr* as an Islamic Legal Concept

a) Some juristic explanations

To attempt a definition of *mahr* an examination of the important expositions from various writers of Muslim law concerning the meaning and significance of *mahr* is necessary. It will be most advisable to prepare an actual record of the excerpts from these writers and authorities. It, however, cannot be gainsaid that these explanations fail to communicate in full the spirit behind the divine expression 'gift spontaneous' used for *mahr* in the Quran.

Hedaya: The payment of *mahr* is enjoined by the law, merely as a token of respect for its object (the woman) wherefore the

mention of it is not absolutely essential to the validity of a marriage and for the same reason a marriage is also valid, although the man were to engage in the contract on the special condition that there should be no *mahr*.[84]

Inayah: (*Mahr* is) the property which is incumbent on a husband, either by reason of its being mentioned in the contract of marriage, or by virtue of the contract itself, opposed to the usufruct of the wife's person.[85]

Kifayah: *Mahr* is not the exchange or consideration given by the man to the woman for entering into the contract.[86]

Baillie: (*Mahr*) is defined to be the property which is incumbent on a husband, either by reason of its being named in the contract of marriage or by virtue of contract itself, as opposed to the usufruct of the wife's person; and it is known by several names, as mahr, *Sudak, Nuhlah* and *Akr*... [*mahr*] is not the exchange or consideration given by the man to the woman for entering into the contract; but an effect of the contract, imposed by the law on the husband, as a token of respect for its object, the woman.[87].

It appears that Neil B.E. Baillie has given his definition of *mahr* on the basis of the texts of *Hedaya, Inayah* and *Kifaya*.

Abdur Rahim:

> *Mahr* ... is either a sum of money or the other form of property to which the wife becomes entitled by marriage. It is not a consideration proceeding from the husband for the contract of marriage, but it is an obligation imposed by the law on the husband as a mark of respect for the wife as is evident from the fact that the non-specification of '*mahr*' at the time of marriage does not affect the validity of marriage.[88].

Al-Fiqh Al-Mazahib Al-Arba'ah:

> Since *mahr* is obligatory which is to be given by the husband to the wife on marriage; on this basis, *Shafi'* is define it as that *mãl* which validates the conjugal rights to man. But the other

jurists have defined *mahr* as that *māl* which is given to the woman in consideration of the benefits taken from her. It means only that *māl* which is given in case of a proper and genuine marriage.[89]

Urdu Encyclopaedia of Islam:

> The proper amount of money or equivalent property that is binding on man as *Qawwam* to be given to woman on marriage, besides usual maintenance, is called *mahr*. Though some jurists have described it as consideration for obtaining bodily benefits by the husband but its meaning and connotation is wider than that. For example half of the fixed *mahr*, desirably whole of it, is payable to the wife even if the marriage is dissolved before consummation.[90].

Encyclopaedia of Islam:

> *Mahr* is in Muslim law the gift which the bridegroom has to give to the bride when the contract of marriage is made ... the 'Kuran' no longer contains the conception of the purchase of the wife and *mahr* as the price, but the *mahr* is in a way a reward, a legitimate compensation which the woman has to claim in all cases. The 'Kuran' thus demands a bridal gift for a legal marriage.[91].

Joseph Schacht:

> [In Islamic law] there is no matrimonial community of goods and no *dot* or marriage portion (dowry in the western sense). The wife has the right to the nuptial gift (*mahr*) and to maintenance (nafaka). This gives her a strong position as against the husband.[92].

Almaric Rumsey:

> '*Mahr*' in its general sense, is a sum of money, or other property, payable by a man to a woman on or after her marriage with him, as a consideration to allow him to have sexual intercourse with her. The husband on his side is entitled to the enjoyment of that for which he has bargained.[93].

Alhaji A. D. Ajijola:

> *Mahr* is an obligation imposed by the law on the husband, as a mark of respect for the wife ... it is a safeguard against the husband's arbitrary power of divorce and is not an exchange or consideration given by the man for marriage contract because the contract only requires union of the parties.[94]

Ameer Ali:

> In order to constitute a valid marriage, the Muslim law requires that there should always be a consideration moving from the husband in favour of the wife, for her sole and exclusive use and benefit. This consideration is called *mahr* or *sadak* in legal treatises, and in common parlance *dain-mahr* (*mahr* debt)[95]

Robertson Smith:

> In Islamic law *mahr* belongs absolutely to wife ... historically speaking, the idea of sale is latent in the law of *mahr* [96]

David Pearl:

> *Mahr* is not a consideration for the contracting of the marriage. The *mahr* must be clearly seen as the effect of the contract of marriage rather than the price paid by the husband for acquiring various rights which accrue to him on marriage. *mahr* is often discussed also in terms of a sum paid to the wife as a mark of respect to her. If, therefore, no *mahr* is agreed upon by the parties, the contract of marriage is neither *fasid* nor *batil*. It is still a *sahih* marriage, and what is referred to by the expression "proper *mahr* " created by the operation of law will become payable. The obligation to pay *mahr* is an effect of the marriage, rather than an incident to it.[97].

Maulana Abul A'la Maududi:

> Men are the protectors and maintainers of women ... man by nature deserves to be the *Qawwam* but apparently he gets this position as a return for the *mal* which he spends by way of *mahr*.[98]

Maulana Umar Ahmad Usmani:

> [*Mahr*] is that present or gift which is given to invoke the pleasure of Allah through fulfilling his orders. It is neither compensation for anything nor is its object to show one's greatness or grace. *Mahr* is that present or gift which is given by man to woman without any idea of any kind cf compensation.[99].

Al-Syed Sabiq:

> Making *mahr* obligatory for women is symbolic of the conferment of property rights upon women by Islam after *Jahiliah* period. That purifies the soul of the woman and she becomes satisfied with the proctorship of the man.[100].

Hazrat Ali:

> [*Mahr*] is an absolute gift (*nihla*) to the wife without any condition.[101]

b) **Excerpts from Judgments**

i) *Mahr* under the Muslim law, is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage, and even where no '*mahr*' is expressly fixed or mentioned at the marriage ceremony, the law confers the right of *mahr* upon the wife as a necessary effect of marriage. ... The *mahr* of Muslim law bears a strong resemblance to the *donatio propter nuptias* of the Romans which has subsisted in the English law under the name of marriage settlement. In this sense and in no other *mahr* under Muslim law be regarded as the consideration for the connubial intercourse, and if the authors of the Arabic textbooks of Muslim law have compared it to price in the contract of sale, it is simply because marriage is a civil contract under that law and sale is the typical contract which Muslim jurists are accustomed to refer to in illustrating the incidents of other contracts by analogy[102]

ii) *Mahr* is an essential incident under the Muslim law to the status of marriage, to such an extent this is so that when it is

> unspecified at the time the marriage is contracted, the law declares that it must be adjudged on definite principles. Regarded as a consideration for marriage....[103]

iii) What is being sought to be enforced here is a contract entered into in contemplation of, by reason of, and ... as has been said in at least one decided case, though some doubt is to be very accurate, in consideration of marriage ...[104]

iv) [*Mahr*] is "a mark of respect" to the wife.[105]

v) A right which comes into existence with the marriage contract itself except that in case the *mahr* is deferred its enforcement is held in abeyance till a certain event, i.e. dissolution of marriage by death or divorce occurs.[106].

vi) The marriage under the Muslim law is a civil contract and is like a contract of sale. Sale is a transfer of property for a price. In the contract of marriage the wife is the property and the *mahr* is the price.[107].

vii) The marriage cannot be regarded as purely a sale of the person of the wife in consideration for the payment of *mahr* ."[108]

viii) It is not correct to say that the right to claim prompt *mahr* does not precede cohabitation and comes into existence alongwith it."[109]

ix) Under Muslim law *mahr* is not the exchange or consideration, as understood in the technical sense in the contract Act, given by the man to the woman for entering into the contract, but an effect of the contract imposed by the law on the husband as a token of respect for its subject, the woman.[110].

x) The fact is that *mahr* is neither 'consideration' nor 'dowry'; it has a unique position of its own.[111]

c) **Legislative definition**

Of all the modern legislations on Muslim family laws, the Moroccan Code of Personal Status, 1958 enjoys the distinction of giving

a concise and comprehensive definition of *mahr* which bears the quality of touching the Divine wisdom. It reads:

> "*Mahr*" means any property given by husband to the wife representing his intention to have a family life based on mutual affection and company.[112]

d) A general analysis of these concepts

The above conceptualization of *mahr* boils down to the following assertions:

i) *Mahr* is a token of respect for woman.

ii) *Mahr* is incumbent on the husband by virtue of the contract itself. It is an *effect* of the marriage.

iii) *Mahr* is a symbol of conferment of property rights on woman by Islam.

iv) *Mahr* is an essential incident to the status of marriage.

v) *Mahr*, which is *māl* spent on wife by the husband, apparently puts him in the position of *Qawwan* (protector, friend).

vi) *Mahr* is a 'consideration' for the marriage given by the husband to the wife.

vii) *Mahr* is a safe-guard against the husband's power to unilateral divorce.

viii) *Mahr* is a measure to strengthen the position of wife against the husband.

In the above juristic expressions, when each taken separately, we find lack of comprehensiveness coupled with diversity in approach and contradiction in terms. It is probably because of this situation that Tahir Mahmood writes:

> Unfortunately, the Islamic concept of *mahr* has been widely misunderstood. Those who are obsessed with contractual element in the

> Muslim concept of marriage regard it as 'consideration' and those who are more familier with 'dowry' confuse it with the same. The fact is that *mahr* is neither consideration' nor 'dowry' it has a unique position of its own.[113]

An appropriate definition of *mahr* can be evolved only after a cumulative consideration of the following facts which may be called — testing facts .

i) Islam recognizes the property rights of woman and each woman retains her individual legal existence even during marraige, which can be symbolized by putting some property under her possession by way of *mahr* at the time of marriage.

ii) Islam demands that the husband must be careful about the matrimonial rights of the wife and his feelings about her honour and dignity must be conspicuous by actions (like payment of *mahr*).

iii) Islam desires that the husband must win the love and cooperation of the wife with the hope of reciprocity and make a symbolic representation of it.

iv) Islam requires that something must be done at the time of marriage which can bring the spouses out of the perplexity of having joined a new phase of life and apprehensions about married life.

In view of these facts the most appropriate definition of *mahr* is found in the Quran itself,—it is a 'gift-spontaneous', *that is, a gift given with a willing heart.*

> And give to the women their *mahr* as a 'gift spontaneous'.[114]

The presentation of a 'gift spontaneous' to the wife implies not only the recognition of her economic rights and equal legal status but raises her position socially to be treated as a source of blessing. Therefore, the term 'gift' qualified by the expression 'spontaneous' represents the true nature of *mahr* as is manifested by the above mentioned 'testing facts'.

d) Legal nexus between *mahr* and aqd al-nikah

In some of the above given juristic and judicial observations *mahr* has been treated, *inter a lia*, as 'consideration' for marriage. The view, however, does not seem to be absolutely correct. Of course, there exists a dominant contractual element in Muslim marriage. But its purpose is to ensure that the marriage must be a voluntary union with free consent from each party. It, cannot be asserted without difficulty that *mahr* is a 'consideration' for marriage in the same way as there is consideration in any ordinary contract. The propounders of this view have themselves faced enormous difficulties in supporting their opinion which is obvious from their muddled conclusions. Mahmood J. who is believed by some to be the main propounder of this view has, in fact in his famous judgement in the case of *Abdul Kadir*, presented only a mixed view of things. He observes:

> 'Mahr' under the Mohammedan Law is a sum of money or other property promised by the husband to be paid or delivered to the wife in *consideration of the marriage*, and even where no *mahr* is expressly fixed or mentioned at the marriage ceremony, the law confers the right of '*mahr*' upon the wife as a *necessary effect of marriage*. To use the language of the *Hedaya*, "the payment of *mahr* is enjoined by the law merely as a *token of respect* for its object (the woman)[115].

The Privy Council, having referred to the said view, has found it unsuitable to treat the analogy of 'sale' and 'Muslim marriage' as absolute. They have denied governing of *mahr* by the same rules as consideration in a contract. It has observed:

> The right of her *mahr* is a fundamental feature of the marriage contract; it has a pivotal place in the scheme of the domestic relations effecting the mutual rights of the spouses at more than one point. While by the Muslim law, marriage itself is viewed as a civil contract and the agreement to pay a certain amount of *mahr* is a part of the contract of marriage, the mere principles of the law of contract as embodied in the Indian Contract Act are insufficient of themselves to account for the main features of the law of *mahr*.[116]

But the following lines from another judgment again sound a different note:

> That *mahr* is purely in the nature of a marriage settlement and is for consideration. It is a claim arising out of contract by the husband.[117]

It is about these and like statements that David Pearl has cautioned the students of Islamic law in the following terms:

> Thus early Indian cases must be read with caution.[118]

Mahmood, J., ignoring the serious differences between a Muslim marriage and an ordinary civil contract, through analogy regards *mahr* as consideration for connubial intercourse. But, his own words show that he had taken up this analogy with no firm belief. He said:

> *In this sense and in no other can 'mahr under Muslim Law be regarded as consideration for the connubial intercourse* and if the authors of the Arabic text books of Muslim law have compared it with price in the contract of sale, it is simply because marriage is a civil contract..., sale is the typical contract which Muslim jurists are accustomed to refer to in illustrating the incidents of the other contracts by analogy.[119]

Marriage is the most important socio-religious institution of Islam with specific objectives and purposes. Resort to analogy in such a situation is not only a juristic mistake but also a deviation from the basic Islamic norms. Islam places both the parties to the marriage on an equal footing, making each subject to social, religious and legal norms. Since each spouse is offering company, support, comfort and co-operation to the other, to think of *mahr* as an ordinary 'consideration' to the woman amounts to the denigration of her position. It may be possible to think so for any commercialized, materialistic and dehumanized brain but it is not possible to think so in Islam. Sulaiman, J. has cautioned about the liberal use of this analogy in the following words:

> The similarity cannot be pushed too far, nor can the principles governing the sale of goods be applied to in all their details. Indeed, if one were to pursue the analogy for enough there would be a *reductio ad absurdum*.[120]

The weaknesses, unsuitability and the obvious absurdity of the 'analogy-scenario' have become further clear from Mahmood J's judge-

ment in *Abdul Kadir* itself when he refused to the Muslim wife a right to withdraw from the conjugal society of the husband for non-payment of *mahr* following the doctrine of 'stoppage in transit' as follows:

> "This lien essentially presumes the right of ownership in the vendee, and terminates as soon as delivery has taken place."[121]

The falsity of this argument has been well explained by Sulaiman, J. in *Anis Begum* in the following terms:

> The marriage cannot be regarded as purely a sale of the person by the wife in consideration for the payment of *mahr* and even if such a grotesque analogy were to be carried to its fullest extent, it would not necessarily result in support of the observations made in *Abdul Kadir's* case ... The lien on goods sold may be lost when possession is lost, but that lien is revived when possession is again recovered. Again if part of the goods have been delivered and part of it is still retained, the lien on the part of it is still retained, the lien on the part retained continues ... if the wife after the consummation returns to her own house she can still resist restitution of conjugal rights so long as her *mahr* is not paid, because her right has been revived after the co-habitation ceased.[122]

Thus Mahmood, J., applying the doctrine of 'stoppage in transit' through wrongful analogy, has failed to provide sufficient justification for refusing a wife the right to withdraw from the husband's society for non-payment of *mahr*. He has begun with a wrong analogy and ended with unsound logic.

Besides, when the analogy of sale and marriage is carried too far one obviously violates the Islamic spirit. This trend has obscured reality and led to absurdity. It reduces the woman to the degree of a chattel. Sulaiman, J. points out that:

> The analogy cannot be carried too far, it does not necessarily clinch the matter.[123]

The real nexus between *mahr* and marriage is manifested by the following observation of David Pearl which he has made with due intellectual concern:

> The *mahr* is paid by the husband to the wife. *It needs to be emphasized at the outset* that the *mahr* is not *consideration* for the contracting of marriage. *The mahr must be clearly seen as the effect of the contract of marriage* rather than the price paid by the husband for acquiring the various rights which accrue to him on marriage.[124]

Tajul'Urus describes *mahr* as *al-ata-o-bila-lwiz* (a gift without return). This is comparable to the honey produced by a honey-bee without any return for that[125]. This is a legal duty of the husband with a social purpose behind it. The Prophet (S.A.W.) has approved even an iron ring as *mahr*. How can this be said to be a consideration for connubial relationship?.

Moreover, it may be clarified that *mahr* is not something connected with divorce and to be given to the wife on the dissolution of marriage. However, if the *mahr* in part or whole has remained unpaid during marriage the husband is bound to discharge this liability towards the wife immediately.

3. Socio-Legal Significance of *mahr* in the Islamic Society

To understand any Islamic concept in its true sense and to comprehend the nature of any Islamic institution in its real perspective, resort must, primarily, be had to the basic source of guidance, that is, the Quran and its over all disposition. Anything prohibited, permitted or enjoined by Islam must be read with its Quranic propensity and inclination. Without such a reference, error is likely to occur and the confusion is certain to precipitate.

The Quranic terms *saduqah*, *nihlah* and *ajr* show that *mahr* is a gift or present from the husband to the wife with the purpose of producing maximum spousal cohesion and its presentation aims at stimulating co-operative living between the spouses.[126]. It inculcates responsibility and invokes reciprocity and fair dealing. *Mahr* as a gift spontaneous shows the nearness of hearts between the spouses. It is a symbol of high matrimonial morality, truthfulness, earnestness, affection and mutual trust and confidence between the spouses. *Mahr*, if not paid by the husband when he is able to pay it and if demanded by the wife when she knows that the husband is not at that time able to pay it indicates a breach in the spousal relationship.

The most natural way of developing good relationship is offering a gift with a willing heart. Its value is not important, but the way it is offered is significant. It is not primarily a monetary benefit to be conferred upon the donee. Therefore, the Quran directs the man to solicit the hand of the woman with *mahr*, with all humility and solicitous approach, as she is the virtue, the potential and the garment of the man[127]

Aside from this, on leaving the paternal home on marriage *mahr* gives to the wife some pleasure, neutralizing the pain of separation which every woman suffers at that time. Giving of *mahr* with open heart makes the wife happy enough to bear the disquietude caused by usual apprehensions about the new matrimonial life.

Mahr is not a part of the contract of marriage. As an *effect* of the marriage it is a post-ceremonial measure. It has a definite role to play in accordance with Divine Wisdom, that is, the establishment of a sweet home with cooperative spouses. Mutual love and affection is the basic arch of every family (the basic unit of Muslim Society) and *mahr* is the key-stone of that arch. In domestic relationship the Quran has laid down great emphasis on mutual love, affection, trust and confidence. It says:

> And of his signs is that He created for you of yourselves, spouses that you might repose in them and He has set between you *mawaddah* (love) and *rahmah* (mercy); Surely in that are the signs for the people who think.[128]

> They are your garments and you are their garments.[129]
> O'children of Adam we have bestowed upon you the garments to cover your shame, and to be an adornment to you and the garment of righteousness, that is the best....[130]

> And live with them (women) with kindness and equity....[131]

The Prophet (S.A.W.) has said:

> I command you to take care of the women in a good manner...[132]

> Every one of you is a guardian and every one of you is responsible; a wife is the guardian of her husband's home and she is responsible.

> Beware, all of you are guardians and responsible.[133]

> From amongst the believers the person of perfect faith is one who is best in morals; and amongst you the best is one who is best to his wife.[134]

> Of all human actions, the one which pleases Allah most is the manifestation of love when made only for winning the pleasure of Allah.[135]

It is basically with this precept that the Quran has enjoined *mahr* in the following words:

> And give to the women *mahr* as a gift spontaneous (a gift with willing heart).[136]

This view is further substantiated by the fact that Prophet (SAW) has even accepted 'teaching of the Quran to the wife' as *mahr*. It creates love (*mawaddah*) and forgiveness (*rahmah*) among the spouses and cements the family-ties. The Moroccan legislature, while defining *mahr*, has really clinched the point by saying:

> *Mahr* is any property given by the husband to the wife representing his intention to have a family based on mutual affection and company[137].

So *Mahr* is not merely an economic benefit to be conferred upon a woman but it has a greater social purpose.

In its broader perspective the obligation of *mahr* does not only provide the bed-rock for a tranquillus home but also plays a role in creating just and chaste social order. Recognizing a just place for women in the society, Islam removed all possible interdictions from them conferring upon them the ownership rights and a right to legally independent existence. In Islam the personality of the wife cannot be deemed to have merged into that of her husband on marriage. She can own property, can sue anybody including her husband and can be sued whenever necessary. *Mahr* as an absolute property of the wife is symbolic of her full fledged legal personality. Al-Syed al-Sabiq, the author of *Fiqh-al-Sunnah* has aptly brought to the fore the socio-legal significance of *mahr* in the following terms:

> One of the best honours that has been conferred upon woman and the best veneration that has been given to them by Islam is that she was vested with the property rights. During the period of *Jahiliah* she could not own even her person. Interdiction was to the extent that even the guardian would snatch her property rendering no possibility or chance for her to own something or to possess anything. Islam liberated her from those heavy weights. This is symbolized by making *mahr* obligatory for her and binding upon men.... This purifies the soul of the women and cultivates trust in the proctorship of man.[138]

Jurisprudentially, something which is socially and morally important and on breach invites moral and social sanctions is in cases of higher desirability made legally enforceable. Islamically *mahr* has been enjoined as a measure for maintaining socio-marital equilibrium when anyone tries to mock at this Quranic directive he cannot escape, besides moral and social sanctions, the legal sanctions. It is in this context that *mahr* has been made legally enforceable before *qadi* (an Islamic Judge). The legal sanctions are invited for breaking the Quranic social norms and for causing disobedience to Allah. And the magnitude of the sanction is determined by the quantum of *mahr* due to the wife. So the *qadi* can ask the husband to deposit the amount of *mahr* with him and handover the same to the aggrieved party.

From the above facts it becomes obviously clear that *mahr* has an apparent social, moral and legal significance. However, as a Divinely ordained institution of Islamic law, *mahr* may, at times, attain many more significant dimensions, especially economic and strategic, to protect women from exploitation.

4. **Some pre and non-Islamic concepts confused with *Mahr*:**

Dower:

At common law, dower was the life interest of a widow in one-third of the legal estates in real property owned by her husband at any time during the marriage. Originally there were varieties such as dower of *ad Ostium Ecclesiae* (at the curch door) and dower *ex assensu patris* (by the heir with his father's consent) where immediately before the marriage the wife was endowed of specified lands; and some times land held in knight service was exonerated from dower; by the widow's taking dower *de la pelvis beale* (of the most fair) of her husband's socage land. But by the sixteenth century these forms were of little importance compared with dower at common law, or subject to local customs under which dower might extend to a quarter, a half or even the whole of the land. Except where the wife had been endowed of specific lands, she was entitled to have her land assigned 'by metes and bounds' by the heir with her *quarantine*: that is, the 40 days during which Magna Carta (1215) permitted her to remain in her husband's house after his death.[139]

The right to dower might be barred by the wife before marriage accepting a jointure (a life estate in specified lands) in lieu of dower or by the complicated uses to bar dower invented in the 18th century. By the Dower Act, 1933, dower in Great Britain was restricted to reality still owned by the husband at his death and not devised by his will, and it could also be barred by a declaration in his will or by deed. Dower thus ceased to be a nuisance to conveyancers. As a small measure of compensation to widows, the Act extended dower to equitable interests.[140]

The administration of Estates Act., 1925, abolished dower. The modern tendency, wherever in common-law jurisdictions the dower continues, is either to abolish or to replace it by other less arbitrary means for providing for widows.[141]

In the United States in such states as did not enact statutes to the contrary, dower continues as at common-law. Some statutes, in most of the states have greatly modified the practices of dower; or substituted a different right or practice for it in the forms like a certain portion of the husband's property, or of the community property of both or of the life estate in portion of his reality.[142] The subject, therefore, in common law has greater reference to alimony rather than *mahr*.

The probable cause for the use of the term dower for *mahr* can be found in the fact that mostly the Muslims since long have not been giving *mahr* to the wives at the time of marriage leaving their claims un-met during the course of the marriage. The unsatisfied claims have, therefore, been usually launched by women or their representatives after the dissoulation of the marrage by divorce or death. It is for this reason that the cases on *mahr*, which for the last two centuries have

come before the courts involve, with rare exceptions, the question regarding widow's rights on *mahr*. Thus, the western writers and judges, being not well versed with the real concept of *mahr*, have adopted the term dower for *mahr* taking it merely as a widow's claim on deceased husband's estate.

Dowry

Dowry is another expression which is being confused with *mahr*. Even the *Encyclopaedia of Seerat*[143] has used term 'dowry' for *mahr*. The term dowry denotes the property, whether real or personal, that a wife brings to her husband on marriage. In English law, until the enactment of the Married Women's Property Act, 1870 the wife's property passed in law absolutely to the husband. The rigour of this rule was modified by the application of the rules of equity to the provisions of settlements, with the result that property was brought into the marriage settlement by the husband, or by the wife or by both, or by persons (such as the parents of either) interested in their welfare and while the legal estate was vested in the trustees of the settlement, the beneficial interest in the property included in the settlement vested as provided by the terms of the deed. Thus while in law a married woman would own no property, the position in equity was quite different. With the passage of Married Women's property Act, 1870, marriage settlements were no longer necessary for preserving the wife's title to her own property.[144]

Again the term, dowry is not a word that has all the technical connotations and implications of the French *dot* which has its roots in Roman Law. Among the Athenians and the Romans the woman, of course, brought the dowry and the Code Napoleon (Article 1540) attached the same character to French *dot*.[145] But in countries like France, where, even if Roman law remained the basis of the law of the country and was revived as such; the husband's rights in relation to the *dot* were not unlimited and the wife could take legal steps to protect the property which she had brought in the community of goods.[146] The French *dot* is analogous to Indian *Jahez* that has now taken the shape of a social evil. *Mahr* is different from these altogether.

Under Hindu Law also the woman, before she was given the statutory protection, was having no legal personality of her own and

on marriage her personality was being said to have merged into that of her husband. So the wife was virtually owned by the husband along with her property, if any. Presently even if the woman enjoys, under the statutory law, some independent existence but the husband in his 'earlier mood' continues to demand property from the wife in the shape of dowry. The present hike in dowry-deaths is an evidence of that fact.

Now in the sub-continent legislations have been made prohibiting the practices of dowry. These anti-dowry legislations, however, exempt *mahr* from their application recognizing it as a separate institution under Islamic law. This becomes clear from the definition of dowry given in section 2 of the Indian Dowry Prohibition Act, 1961 which reads as follows:

> "dowry" means any property or valuable security given or agreed to be given either directly or indirectly
>
> a) by one party to a marriage to the other party to the marriage; or
>
> b) by the parents of either party to a marriage or by any other person to either party to marriage or to any other person; at or before or any time after the marriage in connection with the marriage of the said parties, but does not include *dower* or *mahr* in the case of persons to whom the Muslim Personnel Law (*Shariat*) Act applies.

Thus *mahr* has been identified and recognized as distinct concept, not to be confused with dowry just for the reason that *mahr* has been rendered into English, of course, wrongly as 'dower'. Indian legislature has played quite safe in this respect and to avoid any confusion both words *mahr* and dower have been used in the above mentioned provisions as 'dower' or *mahr* So *mahr* is not the same as dowry.

Stridhan

Stridhan under Hindu Law is not the same as *mahr* in Islam. *Stridhan* literally means woman's property. No exact definition of the

term is available in authorities on Hindu law. Gooroodas Banerjee has given vent to this feeling in the following words:

> "majority of sages and commentators give neither an exact definition of *Stridhan* nor an exhaustive enumeration".[147]

In *Yajnavalkya* a definition of *stridhan* has been attempted though this definition cannot be deemed to be final. It reads:

> What was given to a woman by the father, mother, her husband or her brother or received by her at nuptial-fire or presented on her supersession 'and the like' is denominated as women's property.[148]

By using the words "and the like" in the definition Vijnaneshwara has enlarged the meaning of *stridhan*. So this definition does not make the whole concept of *stridhan* clear and we do not have any other better definition available. But *mahr* as an Islamic legal institution is a different one having its specific purpose and a definite place in its socio-legal set-up.

The difference between *stridhan* and *mahr* will be more clear by making a perusal of the use of the term *stridhan* under Hindu Law for denoting the following:[149]

i) The gifts made to a woman during her maidenhood, coverture or widowhood by her parents and their relatives or by the husband and her relatives. These may be gifts *inter vivos* or by will.

ii) The gifts *inter vivos* or by will made by strangers to a woman during her maidenhood, widowhood; before nuptial-fire or at bridal procession; during coverture by strangers under all schools of Hindu law but Mithila and Dayabhaga.

iii) Property earned by self-exertion during maidenhood and widowhood; during coveture under all the schools of Hindu law other than Mithila and Bombay School; and

iv) Property obtained by adverse possession according to all schools.

It may be pointed out that the position before 1956 was that the gifts received from strangers during coverture were *stridhan* but

these would during her life time remain under the husband's control. On his death these would become her fullfledged *stridhan*.

In a Kerala decision *stridhan* has been held to be covered by the expression 'dowry'[150].

Bride-Price

Some writers have used the expression 'bride-price' for *mahr*. This concept is quite unislamic. This is a callous use of the expression and an offensive way of taking undue liberties about sensitive matters. Unfortunately, misuse of terms is reported from some known writers also. The climax is found in the following lines of a well circulated book which can be read only with exclamation:

> The term 'bride-price' has been used because of its being closer to the original connotation of *mahr* and, to avoid confusion, the term "dowry" has not been used.[151]

To avoid one confusion, as is claimed by the author, a bigger confusion has been created by him. The author has not preferred to use the term *mahr* as such to avoid every possible confusion. Such writings indicate misinformation and lack of intellectual courage.

The expression 'bride-price' indicates the payment by a husband to his father-in-law and the wife is, in effect, bought from her father. Among Hindus a form of marriage namely *Asura*, still prevalent among *Sudras* serves as an instance. In such a marriage the bridegroom receives a maiden after having given as much wealth as he can afford, to her kinsmen. Such a practice has no semblance with *mahr*.

Roman Donatio propter Nuptias

The *mahr* of the Islamic system is said to be similar in its legal incidents to the *donatio propter nuptias* of the Romans which is a settlement in favour of the wife made prior to the completion of marriage contract in consideration of marriage[152] There are, however, essential differences between the two. *Mahr* unlike *donatio propter nuptias* is absolutely obligatory but not necessarily fixed before marriage. *Mahr* is not given in consideration of marriage. A stipulation on

the part of the woman before marriage to abandon her right to *mahr* is invalid and inoperative under Islamic law and should such a stipulation have been entered into, the wife would nevertheless be entitled to proper *mahr*[153]. According to Hazrat Umar even if the wife has remitted the whole or part of *mahr* to the husband and she claims it later, the husband will be bound to pay it to her.[154]

Donatio propter nuptias must also be seen in the light of the fact that the Roman wife was bound to follow the domicile of her husband with no right to question his choice but Islam gives to the woman, in many cases, the right of questioning her husband's choice of conjugal domicile[155]. Among Athenians and the Romans the wives used to bring dowry, also.

Hebrew-Mohar

The Jewish Law insisted upon the specification of *mohar* prior to the contract of marriage, and considered all marriages without a consideration as invalid, but among the Hebrews *mohar* settled on wife was never made over to her for her exclusive use and enjoyment; she acquired in fact no right over it until the marriage was dissolved either by death of husband or by divorce, in which case the *mohar* was made over to her, in order to enjoy it or to dispose it of, according to her own desire[156]. Under the Jewish law, a woman who refused to follow her husband wherever he desired her to go lost her right to her *mohar* and the possessions which she herself brought from her parental home, together with all rights which the law vested in her.[157]

Pre-Islamic Arab Practices

In Pre-Islamic Arabia besides regular marriages many loose genderal relationships were prevalent. The nuptial payments were being made with different names by males to the females. One such practice was given the name *mahr*. Among pagan Arabs the *mahr* was an essential condition for the regular form of marriage and only when *mahr* was given did a proper relationship arise. A marriage without *mahr* was regarded as shameful and looked upon as concubinage.[158]

Mahr would be handed over to the father or brother or relative in whose guardianship the girl was. The bride received no *mahr*.[159]

The obligation to pay was evaded by man frequently through a practice called *shigar*, when a man would give his daughter or sister in marriage to another in consideration of the latter giving his daughter or sister in marriage to the former. In such cases no *mahr* would be paid.

On the basis of nuptial payments some writers like Robertson Smith have classified marriages in Pre-Islamic Arabia into two kinds.[160] One, where the payment was made to the parents or guardians of the girl; it was designated as *baal* marriage. This has reference to the regular form of marriage in Pre-Islamic Arabia. Second, where the so-called wife (a female friend), was given the gifts (*Sadaq*) but not brought to home, was called as *beena* marriage. This obviously has reference to various kinds of loose marriages prevalent in Pre-Islamic Arabia, which were virtually prostitutional practices. We submit that the *mahr* and *sadaq* of the Pre-Islamic Arabia differ from the Islamic institution of *mahr* both in nature and origin. The pre-Islamic practices are characterized by 'bride-purchase', concubinage and lust, while as the Islamic *mahr* has reference to co-operation, durable and friendly marital life and piety. The former practices were devised by men and motivated by lust and kleptomania whereas the latter is Divinely ordained and spiritually motivated. Probably the expression *mahr* was in use in the Pre-Islamic Arabia only because of the fact that this institution must have earlier existed in its actual form under the guidelines of some earlier Apostle but had later undergone a degeneration leaving only the name for use.

From the above survey of various terms confused for *mahr* and their actual connotations we are led to the conclusion that the expression *mahr* must be used as such in every language and the futile exercise of finding substitutes for it be given up. Its real meaning and philosophy must be understood with reference to its literal meaning, specific connotations and the Quranic terms used for it.

5. **Explanation of some more terms**

a) *Nikah-nama:* A written marriage contract.

b) *Kabin-nama:* A written agreement about the settlement of *mahr* containing terms about the amount of *mahr*, time for payment of *mahr*, mode

of payment of *mahr* etc. (It is sometimes incorporated in the *Nikah-nama* itself).

c) *Mahr al-Sunnat:* The *mahr* fixed by the Prophet (SAW) on his wives.

d) *Mahr-al-Musamma:* *Mahr* fixed by stipulation. It is called as fixed *mahr*.

e) *Mahr -e-Fatima:* *Mahr* of the daughter of the Prophet(SAW)

f) *Mahr al-Mithal:* *Mahr* of the equals of the women. It is called as proper *mahr*. When *mahr* is not fixed by parties, to the marriage, proper *mahr* is determined.

g) *Mahr al-Biddah:* Extravagant *mahr*: High claims of *mahr*.

h) *Mahr al-Talj'i:* Ficticious *mahr*; where one amount is privately fixed and the other in general public for glorification. (*Sma'*).

i) *Mahr al-Aqqal:* The legal minimum of *mahr* which is usually taken to be ten *dirhams*.

j) *Khandani Mahr:* Amount of *mahr* as ordinarily fixed in a family.

k) *Mahr indat-talb:* The *mahr* payable on demand.

l) *Dain Mahr:* The debt of *mahr* when while it remains unpaid.

m) *Ba'i Mukasa:* An exchange of property for *mahr*.

n) Mahr-al-Mau`ajjal: Prompt *mahr* payable immediately on demand to the wife.

o) *Mahr al-Mau'wajjal:* Deferred *mahr*; the payment of which has been deferred upto a specified time or happening of an incident.

p) *Mahr al-Ghair Mau'ajjal:* Same as *mahr al-Mau'wajjal* that is deferred *mahr*. The Arabic terms for 'prompt' (Muajjal) and deferred (*Muuajjal*) differ only in the third letter in the two words, which is *ayn* in the first word and *hamza* in the second word (the 21st and the 33rd letters of the Arabic alphabets respectively.) As the two letters are pronounced in *Urdu* and spelt in English in the same way, these appear as same to non-Arabic speaking people. In India the *Urdu* expression *qhair-mu'ajjal* is quite common and also clear and convenient.

q) *Mahr Ghayr-Muqatta:* Indeterminately stipulated *mahr* when it is not clear that how much of it is 'prompt' and how much 'deferred'.

r) *Sikkai Ra'ijal Waqat: Mahr*-value prevalent at a particular time and place.

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127. *The Quran* 7:20.
128 *The Quran* 30:21.
129. *The Quran*, 2: 187.
130. *The Quran*, 4:26.
131. *The Quran*, 4: 19.
132. *Sahih Bukhari*, Kitab al-Nikah, Chapter 80.
133. *Ibid*.
134. *Tirmidhi*
135. *Abu Dawud*
136. *The Quran*, 4:4.
137. *Supra* note 112.
138. *Supra* note 100.
139. *Encyclopaedia Britannica*, Vol. P. 616 (1970)
140. *Ibid*
141. *Ibid*.
142. *Ibid*.
143. *Enclopaedia of Seerat*, Vol. V, P. 475 (London)
144. *Id*. at p. 619
145. *Supra* note 95 at p. 433.
146. *Supra* note 139 at page 619.
147. *Hindu Law of Marriage and Stridhan*; See Paras Diwan, *Modern Hindu Law*, P. 332(1985).
148. *Yajnavalkya*, II, 143.
149. See *Supra* note 147.
150. (1975) Kerala LT 386.
151. Majid Khadduri, *Law in the Middle East*, P. 141 (Washington, 1955).
152. *Supra* note 95 at P. 433.
153. *Ibid*, *Fatawai Kazi Khan*, Vol. I, P. 426.
154. Abul A'la Maududi, *Tafahim al-Quran*, Comments on 4:4.
155. *Supra* note 95 at p. 423.
156. *Id*. at P. 422.
157 *Id* at 432.
158. *Encyclopaedia of Islam* (Supplement) Vol. IV.P. 137.
159. *Ibid*
160. See above in this chapter: Robertson Smith, *Kinship* P. 93; Fyzee, *Outlines of Muhammadan Law* P. 132 (1974).

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Chapter - II

ORIGIN AND DEVELOPMENT OF THE LAW ON MAHR

1. Developmental Pattern

The basic foundations of the law on *mahr*, as an Islamic legal institution, are traceable to the provisions of the Quran. It has further developed with the growth and advancement of Muslim society. A study of *ahadith* reveals that Prophet Muhammad (SAW) himself started the task of working out the detailed rules about the enforcement of *mahr* and has laid down some important guidelines in this respect. The process of setting out the norms and regulations about the payment of *mahr*, to meet various situations arising from time to time, was ultimately carried forward by Muslim jurists leading to the development of law on *mahr* into a full system. Historically, the application of *Shariah* and decision making in Muslim society has taken place on the cases to case basis whereby a rich precedent on the subject has got established. At certain places, however, some local practices, both approvable and disapprovable under *Shariah* have found place in the law on *mahr*. But in many countries of the world considerable legislation has now been taking place on this subject replacing uncertain customs. Presently, the law relating to *mahr* is, therefore, constituent upon the Quranic directives, relevant *ahadith*, juristic expositions in different works on *fiqh*, some local usages and modern legislations.

2. The Relevant Quranic Provisions

The Quran, the first source of Islamic law, contains provisions about the concept, object, obligatory character and some other aspects of *mahr*. The basic Quranic philosophy behind all the Islamic matrimonial institutions has been summed up by Abdullah Yusuf Ali in the following lines:

What can be the holier cement to society
Than that women should be chaste and pure
And crimes against sex rooted out?
Let decency, kindness and justice.
Prevail in all sex relationships;
Let marriage be cherished and carefully guarded
Women's rights secured; family jars
Adjusted; and all life lived
In faith, charity and kindness sincere
To all our fellow creatures.[1]

The provisions of the Quran related to *mahr* can be classified under different heads:

a) **Provisions enjoining payment of *mahr***

i) General directives about *mahr* are:

> "And give the women their *mahr* as a gift spontaneous".[2]
>
> Ye solicit their hand with reward from your property - desiring chastity, not lust, seeking that ye derive virtue from them, ye give them *mahr* as prescribed".[3]

ii) About captives similar directives are found in the Quran:

> Ye are one from another; wed them with the leave of their folk and give them *mahr*, according to what is reasonable; they should be chaste, not lustful, nor taking paramours.[4]

iii) About marriage with *kitabiyah* (the people of the book), the Quran says:

> Lawful unto you in marriage are chaste women among the believers and chaste women among the people of the book revealed before your time; provided ye give them *mahr* desiring chastity not lewdness and not secret intrigues.[5].

iv) Marriage with believing women refugees who have migrated from the land of non-believers is permitted after

ascertaining that they are really the believers. The giving of *mahr* has been made obligatory by the Quran in their case also, as:

> And there is no blame on you if ye marry them on the payment of their *mahr*.[6]

b) **Remission and variation of *mahr***

The Quran permits the remission as well as the variation of *mahr* anytime during the subsistence of marriage. It provides:

> But if they (the wives), *of their own good pleasure* remit any part of it (*mahr*) to you take it and enjoy it with right good cheer.[7]
>
> Give them their *mahr*, as prescribed; but if, after *mahr* is prescribed, *ye agree mutually* (to vary it), there is no blame on you, and Allah is All-knowing All-wise.[8]

Here it is notable that any remittance of *mahr* or variation of that must be in conformity with the spirit of these Quranic expressions as indicated by the terms: *'of their own good pleasure'* and *'agree mutually'*. As per the decision of Hazrat Umar (RA) if the wife has remitted her *mahr* to the husband but later she demands it again that means she had not remitted it willingly or is not willing to do so now, the husband will be bound to pay *mahr*.[9]

c) **Marriage dissolution and *mahr***

Where the dissolution of marriage takes place the wife does not forfeit her right to *mahr*. About the cases where consummation of marriage has not taken place before divorce, the Quran provides:

> If ye divorce women before consummation and without the fixation of *mahr*; bestow on them (a suitable gift) the wealthy according to his means and the poor according to his means; a gift of reasonable amount is due from those who wish to do the right thing.[10]
>
> And if ye divorce them before consummation, but after the fixation of *mahr* for them, then the half of the *mahr* (is due to them), unless they remit it or (the man's half) is remitted by him in whose hands is the marriage tie; and the remission (of the man's half) is the nearest

to righteousness. And do not forget liberality between yourselves. For Allah sees well all that ye do.[11]

Thus where an unconsummated marriage has been dissolved without the fixation of *mahr*, only *mata'* (a fair gift) is payable to the wife and no *mahr*. But where the *mahr* has been fixed and the dissolution of marriage takes place before consummation, half of the specified *mahr* is payable to the wife. However, the separating spouses have a right to freely remit their part of *mahr* so that the wife may remit the other half also or the husband may pay full *mahr* to the wife. Payment of full *mahr* is nearest to righteousness.

d) Restriction on taking *mahr* back

The Quran restricts the claiming of *mahr* back from the wife in following terms:

> But if ye decide to take one wife on separating from another, even if ye had given the latter a whole treasure for *mahr*, take not the least bit of it back; would you take it by slander and manifest wrong.[12]

> And how could ye take it when ye have shared love with each other, and they have taken from you a solemn covenant.[13]

> Nor should ye treat them with harshness, that ye may take away part of the *mahr* ye had given them; except where they have been guilty of open lewdness; on the contrary live with them on a footing of kindness and equity.[14]

The Quran, therefore, does not permit any demand for return of *mahr* through means direct or indirect, harsh or persuasive; during marriage or after its dissolution.

3. The Relevant Ahadith

a) Obligatory character of *mahr*

The obligatory character of *mahr* is evident from various *ahadith*. A famous *hadith* is quoted below in this respect:

> A woman came to Allah's Messenger and said "O" Allah's Messenger I have come to give myself in marriage to you". Allah's Messenger ....

> lowered his gaze ... She said so thrice ... One from among the companions of Allah's Messenger got up and expressed his desire to marry her. On this the Prophet (SAW) said, "Have you got anything to offer as *mahr*"? The Man said, "No, By Allah, O' Allah's Messenger".
>
> The Prophet (SAW) said, "Go to your home and see if you have something".
>
> The man went to his home and returned, saying, "No, by Allah, I have not found anything".
>
> Allah's Messenger said, "(Go again) and look for something even if it is an iron-ring".
>
> He went again and returned, saying, 'No by Allah 'O' Allah's Messenger, I could not find even an iron ring but this is my *Izar* (Waist-sheet)" ... He had no *rida*. He added, "I give half of it to her".
>
> Allah's Messenger said, "what will she do with your *Izar*? If you wear it she will be naked, and if she wears it, you will be naked" ... How much of the Quran do you know?.
>
> He said, "I know such and such *Sura*" Counting them ...
> The prophet (SAW) said, "Do you know them by heart?
> He replied, "Yes ..."
>
> The Prophet (SAW) said, "Go I let you marry her for that much of the Quran, which you know, as *mahr*"[15]

This *Hadith* throws much light on the fact that *mahr* is binding in every situation irrespective of its value and quantum. It may be even an iron ring. The main object is to offer it with an open heart as a gift. This is implied that *mahr* must be determined with reference to the status of the parties.

b) Shighar prohibited

Narrated Ibn Umar (RA):

> Allah's Messenger (SAW) forebode al-*Shighar*, which means that somebody gets his daughter married to somebody else, and the latter gets his daughter married to the former without paying *mahr*[16]

c) **Quantum and subject-matter of *mahr***

Narrated Anas (RA):

> Abdur Rahman bin 'Auf married a woman and gave her gold equal to the weight of a date-stone as *mahr*. When the Prophet (SAW) noticed the signs of cheerfulness of the marriage (on his face) and asked him about it, he said, "I have married a woman and gave her gold equal to the date-stone in weight as *mahr*". He also reported that the Prophet (SAW) said "Give a feast even, with a sheep".[17]

> Allah's Messenger (SAW) manumitted Safiyyah and then married her and her *mahr* was manumission and he gave a wedding banquet with *hais* – a sort of sweet dish made from butter, cheese and dates.[18]

S'ahl (RA) narrated:

> The Prophet (SAW) said to a man, "Bring even an iron-ring (as *mahr*)"[19].

Abu Huraira (RA) reported:

> A man came to Allah's Messenger (SAW) and said: I have contracted marriage with a women of *Ansar*, where upon Allah's Apostle (SAW) asked — for what *mahr* did you marry her. He replied 'four' *uqiyas*. The Allah's Apostle (SAW) remarked ... it seems as if you dig out silver from the side of this mountain (so agree to higher *mahr*.)[20].

Abu Salama b. 'Abd al-Rahman (RA) reported:

> I asked Aisha (RA) the wife of Allah's Messenger (SAW) what is the amount of *mahr* of Allah's Messenger?
>
> She said:
>
> It was twelve *uqiyas* and one *nash*
> She asked:
> Do you know what is *al-nash*?
> I said, "No"
> She said,

> It is half of an *uqiya*, and it (the whole *mahr*) amounts to five hundred *dirhams* and that was the *mahr* given by Allah's Messenger to his wives.[21]

Anas (RA) has reported:

> Abu Talhah married Omme Solaim and the *mahr* between them was Islam. Omme Solaim accepted Islam before Abu Talhah who afterwards sought her in marriage. She said: I have surely accepted Islam; but if you accept Islam, I shall marry you. He accepted Islam and it was their *mahr* between them.[22]

d) ***Mahr* and Khul'**

Narrated Ibn Abbas (RA)

> The wife of Thabit bin Qais came to the Prophet (SAW) and said 'O' Allah's Messenger (SAW) I do not blame Thabit for defects in his character or his religion, but I being a Muslim, dislike to behave in un-Islamic manner if I remain with him i.e. "I cannot endure to live with him or I am afraid that I may become unthankful for Allah's blessings."
> On that Allah's Messenger (SAW) said to her, "Will you give back the garden which your husband has given you as *mahr*?.
>
> She said, "Yes".
>
> The Prophet (SAW) said to Thabit, "O' Thabit accept your garden and divorce her once."[23]

Ata (RA) narrates:

> "Prophet (SAW) said, take not anything more than *mahr* for *khul'* from women."[24]

e) ***Mahr* and Li'an**

Narrated Sa'id bin Jubair:

> I asked Ibn Umar, "What is the verdict if a man accuses his wife of illegal intercourse". Ibn Umar said, "The Prophet (SAW) separated (by dissolution of marriage) the couple of Bani Al-Ajlan

and said to them Allah knows that one of you two is a liar; so will one of you repent?" But both of them refused, so he (SAW) separated them by divorce.

The man said, "What about the *mahr* that I have given to my wife?". It was said, "You have no right to restore any money for if you have spoken the truth you have also shared life with her and if you have told a lie, you are less rightful to have your money back.[25]

f) **Mahr and void marriages**

Al Hasan al-Basari (RA) said :

If a person mistakenly marries a women from the forbidden degrees of consanguinity (i.e. *maharam*). They should be separated with divorce, and she would keep what she has taken as *mahr* and she would not be entitled to take anything else. Later on Al-Hasan said: She would be entitled to take her full *mahr*.[26]

g) **Widow's *mahr***

Narrated Abdullah Ibn Mas'ud (RA):

For a woman whose husband has died and neither her *mahr* has been fixed nor the marriage consummated, there is *mahr-al-mithal* (proper *mahr*).[27]

h) **Mahr and the new converts**

(What) if a pagan or a Christian woman becomes a Muslim while she is the wife of a *dhimmi* (i.e. a non-Muslim under the protection of a Muslim Government) or a pagan at war with the Muslims?, Ibn Abas (RA) said:

"If a Christian woman embraces Islam before her husband by a short while she will by no means remain as his wife legally"[28].

Ata' was asked about a woman from the pagans who had a treaty with the Muslims. She embraced Islam and during her *iddat*, her husband embraced Islam too? Could he retain her as his wife?, Ata (RA) said:

'No', unless she is willing to marry him with a new marriage and new *mahr*."[29]

Ibn Juraij said 'I asked 'Ata,

"If a pagan woman comes to the Muslims (i.e. embraces Islam), will the husband be compensated for losing her as is indicated by the settlement of Allah".

"They are not lawful for the dis-believers, nor are the disbelievers lawful for them. But pay the disbelievers what they have spent (on their *mahr*)."[30]

Ata replied,

"No, for this (return of the amount to disbelievers) was for only between the Prophet (SAW) and those persons who made a treaty with him".

And Mujahid said:

"All this was for only a treaty between the Prophet (SAW) and the Quraish"[31].

i) **Mahr and the orphan brides**

Narrated Urwa that he asked Aisha (RA) about the Quranic verse:

If ye fear that ye shall not be able to deal justly with the Orphan girls, then marry (other) women of your choice, or (the captives) that your right hands possess. That will be nearer to prevent you from doing injustice.[32].

Aisha (RA) said:

O' my nephew; This verse refers to the orphan girls. If such a girl is under the protection of a guardian who likes her beauty and wealth and wishes to marry her with lesser *mahr*. Such guardians have been forbidden to marry them unless they do justice by giving them their full *mahr*, and they have been ordered to marry women other than them.[33]

j) ***Mahr* and *Mutā***[34]

Rabi B. Sabra reported that his father went on an expedition with Allah's messenger (SAW) during the victory of Mecca and "we stayed there for fifteen days, and Allah's Messenger permitted us to contract temporary marriage. I and another person of my tribe went out. I was more handsome than he, whereas he was almost ugly. Each one of us had a cloak. My cloak was worn out, whereas the cloak of my cousin was quite new. We reached the lower or upper side of Mecca where we came across a young woman ... We said: Is it possible that one of us may contract temporary marriage with you? She said, What will you give me as *mahr*? Each one of us spread his cloak. She began to cast a glance on both the persons. My companion also looked at her when she was casting a glance at her side and said: This cloak of his is worn out, whereas my cloak is quite new. She, however, said twice or thrice: There is no harm in accepting this cloak (the older one). So I contracted temporary marriage with her, and I did not come out of this until Allah's Messenger (SAW) declared it forbidden.[35]

Sabra al-Juhanni reported that while he was with Allah's Messenger (SAW), he (SAW), said "O' people, I had permitted you to contract temporary marriage with women, but Allah has forbidden it (now) until the Day of Resurrection. So he who has any(woman with this type of marriage) he should leave her off, and do not take back anything you have given to them as *mahr*."[36]

4. Some Juristic Differences

a) Estoppel against the right to *mahr*

Mahr is an essential incident of marriage in Islam and no juristic differences exist about its being incumbent on the husband. But, some difference of opinion exist about the question that whether the parties can at the time of marriage by their mutual consent exclude the liability of *mahr* or not?. Only Ithna Ashari Shias differ from all other Muslims in this respect who reply the above query in affirmative. So if a marriage takes place with a condition that there will be no *mahr* the marriage will be valid and the condition void, if the parties

are not Ithna Asharis. However, if the parties to the marriage will be Ithna Asharis both the marriage as well as the condition will be valid.

Still there are exceptions to the Ithna Ashari view that it is only a major bride (*baligh*) who can remit her *mahr* at the time of marriage. If the bride is of a weak and facile disposition she cannot, at the time of marriage, agree that there will be no *mahr*. Moreover, such consent on the part of the bride has to be proved with a very clear evidence. The Ithna Ashari husband may also, at the time of marriage reserve an option to cancel the *mahr*, of course, only with the consent of the wife. In no other case can the estoppel exist against the right to *mahr*.[37]

Hazrat Umar (RA) and *Qadi* Shariah have decreed that if a wife remits the whole or part of her *mahr*, but later on demands it, the husband shall be compelled to pay it because the very fact that she demands it is a clear proof that she did not remit it of her own free will.[38]

b) *Personal Service as* mahr

On the basis of the episode of Moses and Shoab (AS) most of the jurists consider personal services by the husband as a fit subject matter of *mahr*. As, for example,

Radd al-Muhtar reports:

> Moses contracted a marriage with the daughter of Shoab, and the *mahr* was that he should graze his sheep for eight years.[39]

As per Fatawa-i-Aalamgiri:

> If *mahr* be this that the husband's slave, male or female, shall serve the wife, it is allowed, and it is quoted from the Mohit Sarakhsee that if the husband be a slave then it is admittedly correct that his services to his wife should be considered as *mahr*.[40]

Durr al-Mukhtar reports:

> Marriage with a female slave or with a minor is lawful in lieu of services rendered by the husband to the owner of the female slave or to the guardian of the minor.[41]

Imam Shafi'i (RA) is also of the opinion that personal services are fit subject of *mahr*, but Imam Abu Hanifa (RA) has observed that:

> If a free man married a women, on the condition in return of serving her for a stated period (a year for instance) or of teaching her the Quran yet her proper *mahr* is incumbent upon him[42]

5. Later Developments

The Quran prohibited all practices of loose-living, temporary sexual unions and "inherting women" which were prevalent since before its revelation. It ordained piety and chastity and standardized the regular form of marriage. It supported and strengthened the family system and concreted the institutions of *mahr* and maintenance (*nafaqah*). All the principles were communicated and explained, in theory as well as in practice, by the Prophet (SAW) to the people. Later the companions of the Prophet (SAW) and the Muslim Jurists identified the sources of law and the method of law-making. Some of the companions of the Prophet (SAW) like Abu Huraira, Anas bin Malik etc. (RA) had specially taken up the task of preserving the sayings of the Prophet (SAW) and others like, Umar, Ali, Ibn Abbas, Abdullah bin Masood etc. (RA) were mostly analyzing these sayings and the Quranic directives to derive rules. For example, the Quran allows remission of *mahr* by the wife but, as mentioned above, Umar (RA) has explained that if the wife has remitted her *mahr* to the husband but later she demands it again, this shows that she had not remitted it willingly or is not willing to do so now; the husband, therefore, will be bound to pay her *mahr*.[43]

The succeeding generations have, in the same way, resorted to *Ijtihad, Qiyas* (Analogical reasoning) etc. to establish the necessary legal norms. Through *Ijtihad* Imam Shafi'i has laid down:

> If a woman on hearing about the death of her husband marries a second husband and then the first husband comes alive, her marriage with the second husband dissolves even without divorce. She has a right to keep *mahr*.[44]

Accordingly, through analogical reasoning the rule has been established that if *mahr* has not been fixed at the time of marriage 'proper *mahr*' (*Mahr al-mithal*) will be payable to the wife. Likewise

the continuous efforts of the jurists and *qadis* have made the development of law possible to bring it to the present level of comprehensiveness. Now modern legislation has joined the said process of development to meet the present day exigencies.

The law of *mahr* as it exists today is well developed like the law relating to other Muslim law institutions. It covers all the relevant matters like: subject matter of *mahr*, amount of *mahr*, mode of its payment, when it becomes due, widowed and divorced women's claims to *mahr* and so on.

Besides, the Quran and *hadith*, all the juristic works contain separate chapters about *mahr*. Regarding that the works like *Fatawa-i-Alamgiri, Al-Quduri, Durr al-Mukhtar, Sharah al-Viqayah* and *Bihishti Zewar* are highly remarkable. Legislation has also been made on *mahr* in many countries of the world and in some of the codes relating to personal status full chapters on *mahr* have been incorporated. In this respect the Jordanian Code of Personal Status (1976)), Lebanies Law on Family Rights (1917-1962), Syrian Code of Personal Status (1953-1975) are noteworthy. The provisions of these and other legislations related to *mahr* are discussed in the present work at relevant places.

6. Past practices and Legislative Trends

Muslims of certain places, even after embracing the faith of Islam have consciously or unconsciously continued to follow some old practices not in full conformity with the Islamic principles. After a long and continuous following of such usages, they could hardly think of any un-Islamic element therein. It is, however, true that in addition to some rejectionable practices there exist many customs which are approvable under *Shariah*. Now, as already observed, the trend of codification of laws has penetrated the field of family law also. This trend has stimulated greater research and discussions under this branch of law especially regarding the justifiability of existing practices and usages. In many countries considerable legislation has already taken place on this subject. The law relating to *mahr* is also developing on the same lines through same methods in India as well as abroad.

a) **Outside India**

About *mahr*, from many countries of the world, some Islamically apporovable as well as disapprovable practices have been reported. Approvable practices are of the kind where under custom, in the absence of any agreement to the contrary, a certain portion of *mahr* becomes payable to the wife at the time of marriage or on demand and the remainder at the later date. In Iraq and Syria this practice has been granted statutory recognition.[45]. In Pakistan and Bangladesh in such a case the entire *mahr* has been made payable on demand.[46]. Another instance of an approvable practice is of *mahr* being payable in an irregular marriage. This practice has received statutory recognition in Syria.[47]

The disapprovable practices are of the kind, as reported one from the Kablyes of Algeria, where marriage still approximates to a form of purchase in which the *'mahr'* is paid to the bride's father by the husband, and is largely recovered by him, should the marriage be terminated, either from her father or from the next husband to whom she is given in marriage.[48]

In some countries fathers make such excessive demands of *mahr* in regard to their daughters as to make it exceedingly difficult for a young man to marry or find a suitable wife. Sometimes higher *mahr* is being fixed as a status symbol for the family in quite disregard to its being a symbol of mutual love and affection. This has invoked legislative response to the extent that under the family law of South Yemen, 1974, it has been provided that *mahr* (prompt and deferred together) must not exceed 100 *dinars*[49]. The Somalian Family Code, 1975 permits as maximum *mahr* an amount not exceeding 1000 local shillings.[50]. The Moroccan Code of Personal status, 1958 restricts a guardian from opposing the marriage of a girl for an inadequate *mahr* which she herself is willing to accept.[51] Also the father or guardian of the bride is statutorily restricted from demanding any money from the husband for handing her over to him or for acting as a guardian.[52] Moreover, for the determination of the amount of *mahr* in cases of dispute legislation has been made in Egypt, Lebanon, Jordan, Sudan and Morocco.[53]

About right to *mahr* on marriage dissolution the Syrian Code provides that if the consideration for *khul'* is fixed as something other

than the *mahr* this consideration is binding and both parties are also released from any obligation regarding *mahr*.[54]. Where the parties do not name any consideration, the *khul'* shall take effect and both parties shall be released from the rights of the other regarding *mahr* and maintenance.[55]

The Ottoman law of Family Rights, 1917 deprives a divorced wife of her *mahr* or makes her return not more than half of her *mahr* where the whole *mahr* has already been paid, if it appears that she alone was responsible for the breakdown of marriage.[56] Under the Moroccan Code of Personal Status, 1958, the payment of *mata-e-talaq* does not remain obligatory where the *mahr* was specified.[57] But among the Ismaili Khojas of East Africa under Article 273 of their Constitution of 1962 compensation remains payable to the wife on the dissolution of marriage in addition to *mahr* where the husband is responsible for breakdown.

One more dimension of the legislations about *mahr* is represented by Pakistan Muslim Family Law Ordinance, 1961, which has utilized *mahr* as a means, though mild, of discouraging polygamy. The relevant provision is as follows:

> Any man who contracts another marriage without the permission of the Arbitration Council shall -
>
> a) pay immediately the entire amount of the *mahr* whether prompt or deferred, due to existing wife or wives, which amount, if not paid, shall be recovered as arrears of land revenue;[58]

It further appears that an effort is going on in various countries to make the relevant statutes more certain and just. By way of an example we may mention below some provisions of the Syrian Code of Personal Status, 1953 as amended in 1975:

Article 54:

> iii) *Mahr* shall be treated as a preferential debt ...
>
> iv) where it is claimed that the stipulated *mahr* is fictitious or fraudulant, either partly can prove it. If the said *mahr*

is not proved to be real, the judge shall enforce 'prompt *mahr*'.

v) Every '*mahr* - debt' stipulated in the deed of marriage or divorce shall be regarded as a secured debt ... Deferred '*mahr*' shall be payable before the expiry of *iddat*.

Article 57:

Increase or decrease in the amount of *mahr* . whether during the subsistence of a marriage or during *iddat*, shall be void if not made in the Court, where this is done by mutual consent the action must be registered.

Article 60:

i) The *mahr* is the due right of a married woman and a husband will not be absolved of his liability except by its payment to her provided that she is legally competent to receive it, unless a particular person is appointed to receive it.

ii) The law of set-off (*taqaddam*) shall not apply to prompt *mahr* during marriage though the same might have been stipulated in the deed of marriage.

These provisions of the Syrian Code have strengthened the women's claim to *mahr* and have garbed the relevant law with certainty.

In the cases regarding *mahr* and divorce some instances of judicial activism are also reported. In Pakistan through Lahore High Court, the Muslim wives have been given the right to a judicial divorce, on repayment of their *mahr*, on grounds which amount to incompatibility of temperament or breakdown of marriage.[59] The Court has based its decision on the following Quranic verse:

> If ye do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of them if she gives something for her release.[60]

The decision is supported by a *hadith* in which the Prophet (SAW) is said to have asked a husband whose wife had taken a dislike to him, although he had not in fact ill-used her, to accept the return of her *mahr* and then repudiate her[61]. The Supreme Court of Pakistan has upheld this Lahore decision.[62]

b) **Within India**

In India the institution of *mahr* enjoys full recognition as a part of Muslim Personal Law. It has been saved from any effect by the anti-dowry legislations.[63] The right of a wife to *mahr* is also not affected by any decree of divorce granted under the provisions of the Dissolution of Muslim Marriages Act, 1939.[64] However, as regards the working of the institution of *mahr* in India one fails to record uniformity about the actual practices prevalent at different places or within different families. No uniform rate of *mahr* exists even in the same area. In some cases it is much lower than the reasonable whileas in others it is much higher than desirable. It ranges from rupees fifty upto some lakhs.

The fixation of *mahr* takes place usually at the time of marriage. Customarily at some places the half of the stipulated *mahr* is deemed as 'prompt' and the remaining part as deferred. The deferred *mahr* is being paid either after divorce or is being realized after the death of the husband. Where no specific terms and conditions are given about *mahr* in *nikahnama*, the Courts decide the cases according to the 'customs prevalent in respective regions'. In case no *mahr* has been fixed at the time of marriage *mahr al-mithal* is payable which is determined with reference to *mahr* fixed or payable in cases of the wife's paternal relations like paternal aunts and sisters.[65]

The husband is legally bound to pay the whole of *mahr* to the wife even if the stipulated amount is beyond his means. The relatives of the wives have not been passive in the realization of *mahr* from husbands especially in cases of marriage breakdown or where there is apprehension of such breakdown. Only in the earlier state of Oudh provisions were made for the relief of the husbands under the debt of higher *mahr* in Section 5 of the Oudh Laws Act, 1876.

The Courts in that area were empowered to fix a fresh reasonable amount of *mahr* with reference to the husband's means and the

status of the wife. Similar law is found in Jammu & Kashmir enacted in Section 2 of the Jammu & Kashmir Muslim Dower Act, 1920. In both places the provision is applicable only to the persons having a local domicile. The Privy Council has held in a case that if a man residing outside Oudh goes to that area and marries within its territory the provisions of the Section 5 of the Oudh laws Act, 1876, cannot be invoked.[66]

7. The Kashmir View of Development

a) Background

The faith of Islam came to Kashmir through some Muslim benefactors (*Muhsineen*) like Hazrat Bulbul Shah, Hazrat Syed Hussain Simnani, Hazrat Mir Syed Ali Hamadani, Hazrat Mir Mohammad Hamadani and their disciples. They visited Kashmir with the purpose of *d'awah*. They considerably succeeded in their efforts in Kashmir which is now predominantly Muslim.

Hazrat Bulbul Shah carries the honour of having brought round to the faith a Buddhist ruler of Kashmir, Renchan Shah, later known as Sultan Sadruddin (d.1325). This marks the beginning of Muslim rule in Kashmir.

Hazrat Syed Hussain Simnani, whose tomb is at Kulgam (a famour town of Southern Kashmir) and is known among the people as *'Padshah'* (the King), was a man of highest spiritual order. He is considered the spiritual head of Kashmir. The people in large numbers continue to go to his tomb for blessings every day from dawn to dusk.

The man who established the faith of Islam in Kashmir with maximum conversions was Hazrat Mir Syed Ali Hamadani. He is known as *Amiri Kabir* and is considered the founder of Islam in Kashmir. He visited Kashmir three times (1372, 1379 and 1383 AD). The contemporary historical evidence, however, reveales that he has visited Kashmir only once. He guided the people not only about the forms of worship but also about economic matters and social behaviour. After him his son Syed Mir Mohammad Hamadani and the local benefactors like Sheikh al-Alam Hazrat Sheikh Noor al-Din Noorani, Hazrat Sultan al-Arifin Sheikh Hamzah, etc. further strengthened the faith of Islam in Kashmir.

The Muslims of Kashmir are almost all Hanafis. The one Shamsuddin Iraqi who visited Kashmir in 1496 AD introduced Shia faith to Kashmir. Three to five percent of the Muslims of Kashmir are Ithna Ashari Shias.

b) Adoption of Shariah by the Muslims of Kashmir

Now Islam has been the dominant faith in Kashmir for the last six hundred years. After its advent Muslims of Kashmir at their hearts have always been ruled only by the spiritually exalted Muslim benefactors and their disciples. This is the basic reason that a large number of shrines and tombs, at least one in each locality, are found in Kashmir and the people are still showing full devotion towards them. The practice among Muslims here has been that they would always seek guidance from such benefactors about the manner and legitimacy of any act either related to *ibadat* or day to day affairs especially marriage, bequeaths, inheritance etc. Their presence at such occasions would be considered as an honour.

The early benefactors performed their duties with full commitment. They within a limited period of time, educated the people of Kashmir, as was primarily necessary, about the Islamic beliefs and introduced the principles of *fiqh* about general rights and duties, marriage, divorce, remarriage, bequeaths, *hiba*, succession, system of government etc. In this respect the works of Hazrat Mir Syed Ali Hamdani, like *Zakhirat al-Maluk* etc. are remarkable which contain a lucid guidance about all the aspects of life. He actually persuaded one of the local rulers Sultan Qutub al-Din (1378-1394 AD) to implement *Shariah* and it was at his instance that the said Sultan divorced one of his wives who were real sisters to each other as Islam does not permit marriage with two real sisters at one and the same time. The further task of explanation and persuasion towards actual following of the various principles of *Shariah* was left to be done by the subsequent, *Peers, Ulema* and *Mufties*.

In effect, this whole process of socio-legal transformation brought the area of matrimonial relationship under the domain of *Shariah*. The institution of marriage in Muslim society of Kashmir is fully governed by *Shariah*, of course, as traditionally interpreted. Only the legally non-essential customary ceremonies with some cultural impor-

tance have continued to exist. The essential and legal aspects of the marriage and the related matters are always looked from the point of view of *Shariah*. Even the special local institutions of *khanadamadi* and *pisar parvarda* in regard to their matrimonial aspects are fully influenced by *Shariah*. The people have now become more conscious about the nature of these institutions *vis-a-vis Shariah,* but it is noteworthy that the rights and duties of the spouses under *Shariah*, especially those of women, have never been fully enforced. Its chief cause is the lack of honest and efficient state patronage and the irresponsible role of subsequent *peers* and *mufties*.

As regards the matters of succession the urban population seems to have embraced *Shariah* forthwith on its introduction to Kashmir but in this regard it has yet to conquer the rural areas, especially the agricultural families. In such families the shares are denied to daughters because the *zamindars* find it damaging to divide their farms into more and smaller plots. It may be pointed out that under *Shariah*, a daughter is entitled to inherit from her parents irrespective of the nature of property.

The position of *Shariah* in Kashmir has remained more or less the same in different periods of history under different monarchs ruling through feudal lords. The common people of Kashmir who are Muslims, could hardly find a chance to make a formal demand for the implementation of *Shariah* here. Any voice, though feeble, but raised with decency for this purpose has always been shamelessly ignored. Now with the growth of literacy the position is fast changing in favour of *Shariah*.

It is to be noted that about the legally significant matters there exist no common customary practices among all the Muslims of Kashmir which could be given the effect of law. The uncertainty in customs leads only to litigation which end after many years only with a compromise-decree. The books on customs are also doubtful.[67]

c) Statutory position of Custom and Shariah in Kashmir

i) Substantive Law

With the advent of legislative era the local rulers and the legislature could have greatly redressed the grievances of the Muslim women

by accepting their matrimonial, proprietary and inheritance rights under *Shariah* in toto. But the rulers of Kashmir have chosen to adhere to the local 'conservative' legal order as enunciated by Jammu and Kashmir Laws Consolidation Regulation, 1872, which was later enacted as Sri Partap Jammu and Kashmir Laws (Consolidation) Act, 1920 A.D. (1977 Smv.). Section 4(d) of the Act confers in clear terms a definite supremacy on indefinite customs. It declares that :

> in questions regarding succession, inheritance, special property of females, betrothal, marriage, divorce, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, wakfs, partition, caste, or any religious usage or institution, the rule of decision is and would be: the Mohammadan law in cases where the parties are Mohammadans and the Hindu law in cases where the parties are Hindus, except in so far as such laws have been, by this or any other enactment, altered or abolished or have been modified by any custom applicable to the parties concerned which is not contrary to justice, equity and good conscience and have not been by this or any other enactment altered or abolished and have not been declared to be void by any competent authority.

By virtue of this provision *Shariah* applies only to the extent it has not been altered or abolished by statutory law or modified by any custom[68]. This policy has continued later at the hands of monarchs as well as constitutional heads. The Indian Shariat Act, 1937 accepting *Shariah* as the rule of decision in personal law matters, has neither been extended to Jammu and Kashmir nor has any such Act been locally enacted (even after the efforts of some people including legislators).

The Jammu and Kashmir High Court has also refused the application of *Shariah* to the Muslims of Kashmir on the basis of Indian Shariat Act, 1937, because it has not been extended to this place.[69]

On their turn the Dogra rulers, to strengthen customary law, got a Code of Customs, prepared by Mr. Sant Ram Dogra, one of their additional Settlement Officers, that is commonly known as *Dogra's Code of Tribal Customs of Kashmir* (1930). The entries in the Code are, we submit, not wholly correct. It also lacks the requisite consistency and appropriateness. The Supreme Court of India referring to the said *Code* in *Gurdit Singh* has observed:

It was not drawn up carefully and correctly..."[70]

Another worth noting observation about the said Code is:

[It is] a customary Code prepared very carelessly, imperfectly, with numerous patent errors, containing inconsistent, unintelligible and highly ambiguous entries, is of no use.[71]

The other works about the customs of Kashmir are equally doubtful and unreliable.[72]

Related to *mahr* are the locally enacted laws, the Jammu and Kashmir Muslim Dower Act, 1920 (referred to above) and the Dissolution of Muslim Marriages Act, 1942 which have their parallels in Section 5 of the Oudh Laws Act, 1876 and the Central Dissolution of Muslim Marriages Act, 1939 (also known as Kazimi Act) respectively. The former enactment enables the Courts to reduce the amount of *mahr* when it is excessive, however, does not equitably permit its enhancement when it is too low. The later enactment does not make any mention about the right to *mahr* of a wife who has obtained *faskh* under the provisions of the Act. It leaves greater scope for customary assertions.[73]. There is no established case law on the subject.

In Azad Kashmir, however, the Jammu and Kashmir Muslim Dower Act, 1920 is not applicable due to the combined effect of Sections 3 and 2 of the Azad Jammu and Kashmir Courts and Laws Code, 1949 and Azad Kashmir Muslim Personal Law (*Shariat*) Application (Amendment) Act, 1952 respectively.

Section 3 of the Azad Jammu and Kashmir Courts and Laws Code, 1949 reads as under:

"All laws and enactments of the Dogra Rule inconsistent with the provisions of this Code or with the enactments passed or adopted by the Azad Jammu & Kashmir Government are hereby repealed and all other laws, shall as far as practicable, continue to remain in force."

Section 2 of the Azad Kashmir Muslim Personal Law (*Shariat*) Application (Amendment) Act, 1952 provides:

"Notwithstanding any rule or custom or usage in all questions regarding succession (whether testate or intestate), special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, legitimacy or bastardy, family relations, wills, legacies, gifts, religious usages or institutions including wakfs, trusts and trust property, the rule of decision shall be the Muslim Personal Law (*Shariat*) in cases where the parties are Muslims".

So after 1952 in Azad Kashmir regarding the matters of *mahr* the rule of decision has been purely the *Shariah*.

ii) Procedure applicable in Kashmir

In Kashmir the Muslim Law, whenever and wherever applicable, is administered by Ordinary Civil Courts applying the ordinary Civil Procedure and not the Muslim Law of Evidence or Procedure. There are no *qadi's* Courts, but the institution of private *muftis* is still existing. The common people, with their full commitment to *Shariah*, still approach those *muftis* for the adjudication of their matters in accordance with Islamic Law. The role of *muftis*, however is not satisfactory. They, in view of their personal gains, make no effort to seek a legislation for making *Shariah* the rule of decision. This could enable the Muslim women of Kashmir to get all their rights under *Shariah* enforced effectively.

d) Pattern of Nikah in Kashmir

In Kashmir the ceremonial proceedings of marriage among all Muslim occupational groups and the tribes are more or less the same. The difference, if any, can be found in terms of economy only. They treat marriage not only as a desirable or necessary biological institution but as a *sunnah* of the Prophet (SAW).

Presently there is no apparent demographic gendre-imbalance but in the female population some increase is being felt which, if continues may have its corresponding impact on marital relationships in future.

As regards the selection of spouses the marriage of an individual is usually arranged by his parents or their senior relatives. In rare cases the proposals originate also from the individuals themselves. Equality of spouses is determined by the elders in terms of social status, wealth, educational qualification, beauty and chastity.

The actual performance of the *nikah* is preceded by betrothal (*nishani*). When the parents of a boy decide in favour of a girl, the boy's father or guardian makes a formal offer of marriage to the girl's parents. The senior relatives of the boy and the elder members of the community are called to attend the ceremony of betrothal at the girl's house. They take some clothes and ornaments with them for the bride. Some quantity of crystallized sugar called *nabat* is also carried by them for the girl's family. For this reason the betrothal is termed as *nabat-nishani* also. Usually a feast known as *nishani-sal* is arranged for the occasion. After some days the girl's relatives also visit the boy's house and have a goodwill feast there. They also take with them some gifts for the boy. In some educationally sound families and tribes the ceremony of *ijab* and *qabul* is also performed on betrothal. Such betrothal is called *nikah-nishani*. But generally this is deferred till actual marriage called *khander*.

In some families, even before the betrothal a simple ceremony of claiming the hand of the girl is performed. A woman or two are sent to the girl's house who put there some money or golden ring in a cup which, if accepted by the girls' people, means that both the parties have agreed to the marriage.

In case of breach of betrothal the parties lose social prestige. It takes place only in extreme cases when there are overriding considerations in its favour. In these cases each party has to return the ornaments and other properties, if any, to the other.

The actual marriage (*khander*) is solemnized a year or more after the betrothal. In some cases it gets deferred indefinitely for as long as five years. On the day of *khander*, the bride-groom dressed in new clothes, after a ritual bath is taken in the form of *barat* (a procession) to the bride's house where the *nikah* ceremony is performed in accordance with Islamic rites. The consent for the marriage is obtained from the bride through her representative (usually maternal uncle and brother) and her affirmation is announced in presence of the invitees. Similar affirmation is then sought from the boy. Then the *nikah-sermon* is recited by *maulvi* and the bride's father is required to fix *mahr*. Usually the customary amount is proposed by him or, leaves it to the *Maulvi* to decide. Where the amount suggested is excessive the settlement is brought about by the *maulvi* and elders present there.

The bride is not requested to propose *mahr* herself nor is its significance explained to her. When the *mahr* is fixed a *nikahnama* is drawn up, except in certain backward *gujjar* families, people of Tilail Valley and other similar regions who do not maintain a written record of *nikah*. This is followed by a feast and the *barat* returns. In some families a separate *nikah* ceremony is held some two or three hours before *barat* proceeds to the bride's place. The *barat* in such cases comes only to have a feast in the bride's house and carry the bride.

The bride comes to the bridegroom's house along with *barat*. She is escorted by her brother or maternal uncle and on reaching her destination, is received by her mother-in-law. A woman relative of the bride, commonly called as 'foster-mother' also accompanies the bride to the bridegroom's house to see her difficulties, if any, there. On the next day the bridegroom's family arranges a wedding feast called *walima*. In some families the sacrifice of a sheep or chicken is also being offered in the name of Allah.

The bride remains in the house of bridegroom for seven days. Then her relatives fetch her back to the parental home. The bridegroom is also invited to accompany her. They stay there for two to five days and return. This is called as *rukhsati*. On their return the bride's relatives give them as per their financial strength property called *jahez*. This practice of giving property has now grown into an evil.

Usually, till *rukhsati* marriage is not consummated. In some families the consummation of marriage is not delayed upto *rukhsati*. There the bride's family arranges a meal for all the members of the bridegroom's family on the second or third day of marriage who return home on the same day. This is called *Pher-Sal*. With this the marriage ceremony completes.[74]

The daughter, when married outside the house loses her right to inherit from her parents. Only a *dukhtar khananishin* (a daughter married to remain at parental home and the boy is shifted there to serve her parents) can inherit from her parents and get son's share. Such marriages are contracted where the parents have no son. The validity of the marriage is, however, determined in accordance with *Shariah*.

e) ***The Practice of mahr in Kashmir***

The practice of *mahr* at a certain place is influenced by:

i) the awareness or ignorance about the principles of *Shariah* and their utility;

ii) the economic position of the families involved;

iii) the personal qualities of the parties concerned; and the social behaviour of the people in general.

Among the Muslims of Kashmir also the practice of *mahr* is effected by these factors. Down the history of Kashmiri Muslims, the Muslim women, ignorant about their rights under *Shariah*, have never been active about the fixation and realization of *mahr*. Though the general ignorance about the real spirit of *mahr* continues, the fixation of *mahr* has been a regular feature of every Muslim marriage in Kashmir. It is fixed with regularity but the incidence of actual voluntary payment of *mahr* has always been rare.

The quantum of *mahr* depends upon the economic background of the parties to the marriage. In most of the cases its fixation has been nominal. But now the trend is towards an increase in the quantum of *mahr*.

Till date the actual practice of *mahr* has been so poor that the various books on Kashmir History or culture are almost silent about this significant Muslim Institution. Whatever may be the reasons for this, in effect, the women are deprived not only of their ordinary rights under *Shariah* but they have remained ignorant even about their property rights a feeling of which could have been created in them by the payment of *mahr* on marriage.

f) ***Emerging trends***

The last one decade has witnessed a tremendous change in the approach of the Kashmiri Muslims towards *Shariah*. They are now more positive in their assertions. People resort for advice to *imams* private *muftis* and learned people. Now in all the localities of Kashmir valley private *Shariah-boards* have been established. However,

there exists no regular mechanism of reporting the decisions of these boards. In local newspapers some times notices from and opinions expressed by these boards appear. Some issues like that of the necessity of guardian's consent for a major girl's marriage have invited even public debate. The difference of opinion is being well tolerated and it is being considered a healthy sign of development and necessary for wide application of *Shariah*.

Many young men prefer to discharge *mahr* of their brides at the time of marriage which is appreciable. The amount of *mahr* in such cases presently ranges from one thousand to thirty thousand rupees depending upon the circumstances of each case.

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Chapter - III

WHAT CAN COUNT AS MAHR

1. Basic Principles

a) Subject matter of *mahr*

i) Anything which has value

Mahr can be either monetary (that is, a sum of money) or non-monetary (that is, any kind of property other than money). The thing contemplated must have value and must be reasonably certain. It cannot be a mere promise to do or to abstain from doing something which cannot be enforced by the Court.[1] In other words anything over which the right to property may be exercised, or anything which may be reduced into possession, either in the present or in the future or anything which comes within the meaning of the word *māl* may form the subject of *mahr*.[2] Profits (*munafa*) accruing from land, investment, business, industry, etc. are proper subjects of *mahr*. Debts due to the husband from other people are also fit to be offered as *mahr*.[3]

ii) Personal services as *mahr*

Difference of opinion exists as to whether the personal services rendered by the husband can constitute *mahr*. In Hanafi law personal services rendered by the husband cannot be the *mahr*; but in Ithna Ashari and Ismaili laws husband's personal services may form the *mahr*.[4] The Hanafi view is that if a free man were to marry on the stipulation that he would render his own services to his wife in lieu of *mahr*, the marriage would be valid but the woman would be entitled to *mahr al-mithal*. But if a slave, by his owner's consent, marries a woman on the same terms, it is lawful and the woman is entitled to the stipulated service only.[5] In this respect reference may be made to the following Hanafi authorities:

The text of the *Tanwir al-Absar* is as follows:

> And if the husband be free and should marry either a free woman or a slave girl on condition of serving her for a year (in other words a determinate period), the woman would be entitled to her *mahr al-mithal*[6]

Radd al-Muhtar comments on this passage in the following words:

> If the husband should condition that he would serve the wife for a year, this, according to the two Sheikhs (Abu Hanifa and Abu Yusuf), would make the husband liable for the *mahr al-mithal*. According to Imam Muhammad the woman would receive the value of services."[7]

The author of the *Radd al-Muhtar* further points out:

> [H]ere restriction is placed on the word 'service', for, should a man marry a woman on the condition that he would carry her load or ride her animals, or cultivate her land and such matters, which result in profit, for a determinate period by way of *mahr*, such a condition is valid. For, all this is the profit of *mahr*.[8]

According to the Hanafi doctrines, an assignment of insurance policies would form a valid *mahr*.[9] Among the Shias and Shafi'is, however, a free man may assign to his wife his own services in lieu of *mahr*.[10]

iii) **Instruction in religion**

Among the Hanafis,, if a man were to marry a woman, engaged to instruct her in religion, or to take her on a pilgrimage (in lieu of *mahr*); the stipulation would be in-operative, and the woman would be entitled to *mahr al-mithal*. Ameer Ali points out that according to the primitive Hanafi notions, when a man marries a woman on the condition of instructing her in the Quran, he becomes liable for the *mahr al-mithal*; but according to the modern legists, the condition is valid.[11]

The author of the *Bahr al-Raik* states that it is lawful to receive remuneration for instructing in law or in the Quran, and that on this is the *fatawa*; and that consequently, it is lawful to make instructions in

the Quran the subject of *mahr*.[12] Instruction in religion or arts, an engagement to take the wife on a Pilgrimage may according to this doctrine, form the valid subject of *mahr*.[13]

iv) **Future property**

When something is assigned by way of *mahr* which is not in existence at the time of fixation either substantively or as a creation of the law, such assignment is not valid. For example, if a man were to settle on his wife by way of *mahr* the future produce of certain trees or lands in his possession, it would be invalid, and the woman would have a right to the usual *mahr*. But the assignment of a *chose in action*; or the sale proceeds of something of which he is a proprietor, would constitute a lawful *mahr*.[14]

The relevant text of the *Tanwir-al-Absar* is as follows:

> "It is lawful for a man to assign for *mahr* the ten *dirhams* which may be due to him from somebody else"[15]

It is, therefore, lawful for a man marrying a woman to fix for her *mahr* anything which may be due to him from her, or which may be due to him from somebody else. For example, if ten *dirhams* are due to him from Zaid, he may fix that for *mahr*, and the woman would be entitled to get that amount either from the husband's debtor or from the husband; if the debt is owing from the woman herself, it is on the footing of *ain* (a thing in specie).[16] *Radd al-Muhtar* also provides:

> Similarly, if a man were to fix for *mahr* a *manfa'at* (profit), that also will be lawful; for example, residence in a house, or the right of riding on an animal, the right of cultivation, etc. but that the period thereof should be ascertained.[17]

The usufruct or property not in existence, contingent benefits, etc., may according to the Shia doctrine, form the valid subject of *mahr*.[18]

b) **Quantum of *mahr***

The question that what will be the *mahr* for a particular woman on marriage is primarily left by the law to be determined by the parties

to the marriage who can settle it before, at the time of or after the marriage, of course, subject to legal conditions. It is, however, not necessary for the parties to settle this matter themselves. The law also provides definite rules for the determination of the amount of *mahr*. However, these rules operate only if the parties have not settled any *mahr* mutually.

Thus where the parties are competent to contract their own marriage they may fix the *mahr* by mutual agreement. This agreement may be oral or be reduced to writing. In the latter case it is called *mahr-nama* or *kabin-nama*. The *mahr-nama* or *kabin-nama* may be incorporated in the *nikan-nama* itself.

Where a party to the marriage is incompetent to contract his or her own marriage, the *mahr* may be fixed on his or her behalf by the marriage guardian (*wali*). In such a case if the marriage is binding on the person married, *mahr* too will be binding[19]. The *mahr* which the parties to a marriage may fix by stipulation is called *mahr al-musamma* ('specified *mahr*') and the *mahr* to which wife becomes entitled by the operation of law, when parties have not fixed, it is called *mahr-al-mithal* (proper *mahr*).

i) Extent of *mahr al-musamma*

The classical works mention ten *dirhams* as the legal minimum of *mahr* (*mahr al-aqqal*)[20]. Hanafis follow the same precedent. In Hanafi law, therefore, neither the parties to a marriage nor any marriage guardian can stipulate for a *mahr*, the value of which is less than the 'legal minimum'[21] However, under Ithna Ashari and Ismaili laws there is no 'legal minimum' of *mahr*. In Shafi'i law the 'legal minimum' of *mahr* is recommended, but not insisted upon.

There is no fixed rule as to the maximum amount of *mahr*, though the husband can at any time, during the subsistence of marriage increase the *mahr al-musamma* as originally specified.

The Prophet (SAW) did not enunciate any fixed rule as to the amount of *mahr*. He appears to have settled 500 *dirhams* upon Maimuna and the Shias consider that amount to be the *mahr-al-sunnat*. The *mahr* of Fatima (RA), the daughter of Prophet (SAW), was 400

dirhams[22]. The *Radd al-Muhtar*, however, lays down with considerable distinctness that whatever amount exceeding the minimum the man agrees to pay as *mahr* he will be liable for that.[23] About this rule only one exception has been reported, that is, where a minor is given in marriage by his guardian and the *mahr* fixed is exorbitant, either beyond the means of the husband or covers his entire property, the husband's liability will be limited to the *mahral-mithal*[24]. The Shiah *Shara'ya* also says that there is no limit either to the maximum or minimum of *mahr*; it being a matter of contract between the husband and the wife; so long as the article given or assigned by way of *mahr* possesses any definite value, the assignment is considered valid.[25]

There is no distinction so far as this principle is concerned between the Shias and the Sunnis[26]. Both schools, however, regard excessive *mahr* as improper though not absolutely illegal[27]; but this recommendation has usually been disregarded by the Muslims.[28]

Precedent reveals that the amount of *mahr* depends on the social position of the parties and the conditions of society in which they live. As for instance the early Hanafi lawyers fixed ten *dirhams* (equal to about five shillings) as the minimum for *mahr*, but the Malikis, inhabiting a poorer and less populous country than that in which the early Hanafi lawyers flourished, considered even a smaller sum as permissible.[29]

Often large sums are stipulated as *mahr* merely as a device to prevent, on the part of the husband, the capricious exercise of the power of divorce vested in him.[30] It is a wholesome method of maintaining the balance between the rights of husband and wife. But as the law is generally administered it often works great injustice on children.For instance, when a man leaves children by a pre-deceased wife and a second wife on whom he has settled, either from vanity or pressure from her relatives as a device against divorce, a preposterous *mahr*, which he never had an intention of paying but the Courts enforce the contract in its entirety. In such a case the widow gets the whole estate of the deceased to the absolute exclusion of the children.[31]

At certain places and in some families large amounts of *mahr* are being fixed without any intention of paying or exacting payment of such amounts. Another type of situation is presented by the cases

where a moderate *mahr*, in accordance with the means and status of the parties, is settled in private, but to give *eclat* to the marriage and for purposes of 'glorification' a large amount is mentioned in public and entered in the deed which is read out to the guests. This subject is treated in the *Fatawai-Alamgiri* under the title of *al-sum'at* (with a *zamma* on the first syllable, and a *fatah* on the last.

Al-suma't according to the *Lugat* means a public announcement of something with the object of self-glorification. 'In the language of law' it means a *mahr* announced to the public with the same object. The *Shara'ya-al-Islam*, states the Shiah doctrine that in such cases the private arrangement will constitute the lawful *mahr*.[32]

The *Fatawai-Alamgiri* gives the Hanafi rules in some detail[33]. According to that if a man were to marry a woman for a certain *sadaq (*mahr*)* settled privately and announced a large amount in public *(fi al-lelania)* the subject assumes the following aspects:

i) If the parties agreed to its settlement (viz; the private arrangement), or the man has called evidence to prove against her (the woman) or her guardian (if she be a minor) that the *mahr* was that specified privately and the larger amount was *sum'at* (for glorification), in that case the *mahr* will be that which was settled in private.

ii) If the parties differ as to the amount settled privately and the man alleges that it was 1000 (*dirhams*) and the woman denies that amount, her allegation will be accepted and the *mahr* will be that specified in the contract, unless the husband can adduce proof (of his allegation).

iii) If, in the case of a dispute between the parties as to nature of fixation, no evidence can be called as to the excess being *sum'at* then the *mahr* will be that stated in the public.[34]

iv) If the husband says that what he acknowledged in public was a joke (*hazl*) and the woman asserts that it was the fact, in such a case her statement will be accepted and the *mahr* will be that mentioned publicly, unless the husband adduces proof in support of his claim.[35]

v) When a man and woman settle in private certain *dinars* as the *mahr*, and then contract the marriage in public on condition that there shall be no *mahr* to her, the *dinars* settled in private will be her *mahr*.

vi) If the man were to marry her on condition that the *dinars* shall not constitute her *mahr*, or if he were to marry her publicly observing silence as to the *mahr* (without specification of *mahr*). In both these cases the marriage would be contracted at the *mahr al-mithal* of the woman.

The Muslim law recognizes the validity of arrangements of this nature, regarding the private settlement as the real contract and treating the public declaration as nominal and fictitious. The British Indian Courts in dealing with cases of exorbitant *mahr* have lost sight of this principle, with the result that in many instances great injustice has been occasioned to the heirs of the husband.[35a]

Section 92 of the Indian Evidence Act, 1972, does not touch this question. For an allegation that the real *mahr* was different from that stated in public and recorded in the *mahr-deed* would not mean a variation of the written contract; it would only amount to an assertion that the real contract was different. The *onus*, of course, will be on the person making the allegation.

Where a *wakil* or a mandatory who accepts a commission to arrange a contract of marriage and to stipulate for a certain *mahr*, exceeds his authority and fraudulently increases the *mahr*, the husband would only be liable for it if he knew that before he consummated the marriage. It is so because the *wakil*, had exceeded his authority. If, before consummation, the woman knew of the fraud of the husband's agent, she would be entitled only to the sum for which the authority was actually given. If both parties were aware of the fraud then the husband would be liable for the whole amount.[36]

When it is alleged that the first contract has been modified by a subsequent one, the *onus* rests on the party making the allegation[37]

ii) Extent of *mahr al-mithal*

When no *mahr* is fixed at the time of marriage or has not been distinctly specified either before or after marriage, or has been inten-

tionally or unintentionally left indeterminate, the woman by the operation of law becomes entitled to what is called the *mahr-al-mithal*, 'the *mahr* of her equals' or the 'proper *mahr*' or *khandani mahr*. Some call it customary *mahr*. The proper *mahr* of a woman is regulated with reference to the social position of her father's family and her own personal qualifications, and the *mahr* that has been given to her female paternal relations, such as, her consanguine sisters or paternal aunts, or the daughters of her paternal uncles. The *mahr* of wife's mother or of the girls in the wife's mother's family will not be considered unless the mother is an agnatic relation (paternal cousin etc.) of the wife's father. It, however, does not necessarily follow from the rule that the proper *mahr* should be regulated with reference to the position of her father's family only and no attention should be paid to the mother's position.

In fixing the amount of *mahr*, some other points, besides the customs which prevail in the woman's paternal family, must be taken into consideration. For example, if one sister marries a rich man and the other a comparatively poor man, the *mahr* of the one cannot be taken as a standard for the *mahr* of the other. It is, therefore, laid down that, in order to find a proper test for the proper *mahr* of a woman, the condition of her husband in respect of wealth and lineage should be like that of the husband of the woman to whom she is compared.[38]

In the same way, a woman may be superior to all the female members of her father's family in intellectual attainments or personal attractions and accordingly her *mahr* can hardly be regulated by the *mahr* of her less fortunately endowed female relations. The *Hedaya* says:

> In regulating the *mahr-al-mithal* of a woman, attention must be paid to her equality with the women from whose *mahr* the rule is to be taken, in point of age, beauty, fortune, understanding and virtue, because the *mahr* varies according to any difference in all these circumstances, and, in like manner, it differs according to place of residence or time.[39]

The *mahr-al-mithal*, therefore, varies in amount according to the social position of the woman's family, the wealth of her husband, her own personal qualifications, the circumstances of the time and the

conditions of society surrounding her. No fixed rule can be laid down as to the amount of *mahr* in any particular case. It is, therefore, said that the *mahr* of the woman, where no *mahr* is stipulated or specified at the time of marriage, should be the *mahr* of her equals. It is only intended to imply, that an approximation may be made by observing the custom which has prevailed in her father's family, provided she does not differ in intellectual capacity or personal attraction from the female relations with whom she is compared.[40]

The same rule respecting proper *mahr* is in force among the Shias. *Irshad* puts it as follows:

> The *mahr-al-mithal* of a woman is regulated by a regard to the nobility of her birth, the beauty of her person and the custom of her family relations.[41]

This is supplemented by *Tahir al-Ahkam* and the *Jama-ush-Shittat* providing:

> As there exist different customs in different places in respect of *mahr*, in fixing the amount of the *mahr-al-mithal*, regard must be paid to the *mahr* of the women who are the equals of the female in question, in knowledge, lineage, wealth, understanding and such like.[42]

Among the Shias, *mahr* can be said to be of three types, viz. (a) the *mahr-al-Sunnat* or Traditional *mahr*; it refers to the amount of the *mahr* adopted by the Prophet (SAW) and is said to be 500 *dirhams*; (b) the *mahr-al-mithal*, and (c) the *mahr al-musamma*, the specified *mahr*.

Some of the Shias are of the opinion that where no *mahr* is settled at the time of marriage, and an approximation is made from the custom prevailing in the woman's family, the amount should not exceed the traditional 500 *dirhams*.[43] In an Ithna Ashari marriage, where the wife is given a discretion to fix the *mahr* subsequent to the marriage, she can name any amount not exceeding *mahr al-sunnat*.[44] The same is the general rule in Islamic law.[45]

Ameer Ali, however, points out that this view has long been abandoned, and, nowadays, the same principles which regulate the approximation of the customary *mahr* among the Sunnis are in force also among the Shias.[46]

In a situation when no example is available from the woman's family, the following principle can be followed:

> When there is no example forthcoming for determining, the *mahr-al-mithal*, the position of the father's family ought to be taken into consideration. And it is allowable, nay incumbent, on the judge, in the absence of examples in the woman's family to enquire into the custom among strangers occupying the same rank in life, and living under the same circumstances even in different cities. And when all the conditions are not similar, so much as are identical or analogous should be considered.[47]

iii) *Mahr* in the family of the Prophet(SAW): relevant excerpts

> "The Prophet(SAW) did neither give his daughter in marriage nor did he marry any of his wives on a *mahr* higher than 12 (twelve) *auqiyahs* and a *nush*. 'Nush' means one half of an *auqiyah*. One *auqiyah* is 40 *dirhams* and one *nush* is twenty *dirhams* and thus it (the *mahr*) amounts to 500 (five hundred) *dirhams*.[48]

> According to the Shafi'is and the Hanbalis it is desirable that a *mahr* should not be less than (ten) *dirhams*. The view is adopted to avoid a conflict with Abu hanif's view. It is also desirable that it should not exceed 500 (five hundred) *dirhams*, which was the amount of the 'mahr' of the daughter of the Prophet(SAW) and his wives. The *mahr* of Ommi Habiba, one of the wives of the Prophet(SAW), was, no doubt, 400 (four hundred) *dinnars* (a gold coin) but that was fixed by Najashi as a mark of distinction to the Prophet(SAW).[49]

> It is stated that in the account given of the marriage of Abu Jaifar, the second, that he said that Ali, son of Musa, proposed to marry Ommul Fazl, daughter of Abdullah Al Mamum and gave her as *mahr* 500 (five hundred) genuine *dirhams*, which was the amount of *mahr* of his great-grand-mother, Fatima.[50]

> The Prophet(SAW) gave Fatima in marriage to Ali. Her *mahr* according to one report was 480 *dirhams*; according to another it was 400 (four hundred) *mithqal* of silver. According to a third report it was 500 (five hundred) *dirhams* and this is the most authentic report.[51]

> Ali (RA) has said that "This is the Messenger of Allah. He has given his daughter Fatima to me in marriage on (a *mahr* of) 500 (five hundred) *dirhams*. I have accepted it, ye should know it from him and be witness".[52]

> It is reported from Abu Salmah, "I asked Aisha 'what was the Prophet's *mahr*? "The *mahr* fixed by him" she said, it was 12 (twelve) *auqiyahs* and a *nush*", she said, "Do you know what a *nush* is? I said 'No'., she said, 'It is one half of an *auqiyah* and thus it (the *mahr*) amounts to 500 (five hundred) *dirhams*.[53]

> Umar said, "I do not know that the Prophet(SAW) married any of his wives or gave any of his daughter in marriage on a *mahr* exceeding 12 (twelve) *auqiyahs*.[54]

> It is reported from Ommi Habibah (that) she was the wife of Abdullah (obedullah) son of Jahsh. He died in Euthopia and Najashi gave her in marriage to the Prophet(S.A.W.), fixing *mahr* on his behalf at four thousand. According to another report at 4,000 (four thousand) *dirhams*, and sent her to the Prophet (SAW) with Shurhabil son of Hasanah.[55]

iv) Addition to *mahr*

Husband has the power of making an addition to the *mahr* during the subsistence of the marriage, just as the wife may make an abatement. Among the Shafi'is such an addition is regarded as gift. Since under Islamic law no gift is valid without seisin, any addition made by the husband to the *mahr* requires that delivery thereof should be made at that time to the wife.[56]

Among the Hanafis and Shias, the addition is not regarded *gift* or *hiba*. To render it valid, they, therefore, donot require delivery of seisin, at the time the addition is made. "It is," says the *Hedaya*, "an alteration of the terms of the contract in a non-essential matter within the power of the parties, and, like an addition to the price in sale, becomes incorporated with the original *mahr*."[57]

When a separation takes place before consummation, the wife is not entitled to the benefit of any post-nuptial settlement or additions made to *mahr* after marriage.[58]

2. Legislation in Muslim Countries[59]

Algeria

The Algerian Family Code of 1984 is silent about the quantum of *mahr*. The Muslims of that country will continue to be governed by

their respective schools of law to which they belong, that is, Maliki and Ibadi.

Egypt

In early Islamic History the home land of Shafi'i school adopted Hanafi legal system when it became an autonomous province of the Ottoman Empire. In the current century the Egyptian legislature made some important enactments relating to the family relations beginning from 1920 to 1929 till the recent amendment of 1985. About the quantum of *mahr* statutory provisions were incorporated for the first time in Egypt in 1929 (Law No. 25 of 1929) under Articles 18 and 19 of the said law which read as follows:

> "If there is a dispute between the spouses as to the amount of *mahr*, the wife shall be asked to prove her claim. If she fails to do so, the statement on oath made by her husband shall be accepted, except when he states an amount which cannot be normally supposed to be the *mahr* of a woman of her status. In such a case, the proper *mahr (mahr-al-mithal)* of the wife shall be binding on him". (Art. 18)

> "Where the parties to such a dispute are one of the spouses and the heirs of the other spouse, or the heirs of both the spouses, the provision of article 18 shall apply". (Art. 19)

In 1977 Egypt abandoned its old constitution of 1923 and adopted a new constitution. After the new constitution in 1979, besides other significant amendments, another clause about payment of *mata'* for two years to a divorced wife was added to above mentioned Art. 18 as part (2) by law No. 44 of 1979 called Jihan Law, 1979. In May 1985 the Jihan Law of 1979 was struck down by the Supreme Court of Egypt as *ultra vires*, the Constitution of 1977. Then in December 1985 a new law no. 100 of 1985 once again amended the two old laws on personal status 1920-1929. The provisions of earlier Article 18 and 19 have been assembled in Article 19 only with no substantial change in the pre 1985 provisions. The new added part 2 of Article 18 which related to *mata'* has been numbered as Article 18A. The only provision (Art. 19 of the amended law) that now relates to the determination of the amount of *mahr* reads as follows:

> If there is a dispute between the spouses regarding the amount of 'mahr', the wife shall be asked to prove her claim. If she fails to do so, the statement on oath made by the husband shall be accepted unless he states an amount which cannot be normally supposed to be the '*mahr*' of the woman of her status, in which case the proper '*mahr*' of the wife shall be binding on him. Same rule shall apply where the parties to the dispute relating to '*mahr*' are one of the spouses and the heirs of the other spouse, or the heirs of both the spouses.

Iraq

Till 1959, the Hanafi and Jafri Muslims in Iraq followed in matters of personal status, the unqualified laws of their respective schools. The only common provisions of the family law enforced by the state were found in the two Imperial Decrees, containing no provision about *mahr*, issued by the Sultan of Turkey in 1915. The Ottoman Law of Family Rights, 1917 was not extended to Iraq. In December, 1959 the Iraqi legislature enacted the *Qanun -al-Ahwal al-Shakhsiya* (the law of personal status). In the Chapter III of the said Iraqi legislation some provisions were incorporated about *mahr*. About the amount of *mahr*, in Article 19(1) it was laid down:

> "A woman is entitled to the *mahr* specified in the contract; if it has not been specified she shall get the proper *mahr (mahr-al-mithal)*"

The provision has been retained without any change in the Iraqi Code of Personal Status, 1959, even after many amendments made upto the latest one in 1983.

Jordan

In Jordan, the Ottoman Law of Family Rights, 1917, with the exception of few articles remained in force till the enactment of the Jordanian law of Family Rights (*al-Qanun al-haquq al-Aila*) in 1951. The law of 1951 contains no substantive provision about the quantum of *mahr*. It, however, requires a strict adherence to the entries made in the Certificate of marriage. Article 51 of the law of 1951 provides:

> A dispute concerning *mahr* shall not be entertained if the claim made in this respect is different from the entry in the certificate of marriage, or is not proved by written evidence.

The law of Family Rights 1951 remained in force in Jordan until 1976, when replaced by *Qanun al-Ahwal al Shakhsiyah*, the

Jordanian Code of Personal Status, 1976. This code was amended in 1977 giving it retrospective effect in matters of divorce. The Code contains 187 articles arranged in 19 Chapters on marriage, property and inheritance. Chapter on *mahr* is comprised of Articles 44-65. Article 51 has been retained in the new legislation without any modifications. No other provision deals with the quantum of *mahr*.

Kuwait

Since the last part of the seventeenth century Kuwait was a part of Ottoman Empire and the Ottoman legal and judicial system was made applicable there. The local rulers belonging to the Maliki School of Islamic law had, however, preserved their special religious law and usage. During the period of 'British Protection of Kuwait', the westernized system of judicial administration set up by British claimed jurisdiction over Non-Arab inhabitants of Kuwait, however, the Arabs continued to be governed by the Islamic law – especially in the matter of personal status, family relations and succession.

After the end of British 'protection', Kuwait adopted its own constitution declaring Islam as State religion and *Shariah* as the primary source of legislation in the country.[60]

In Article 9, it declares:

> "Family is the corner stone of society founded on religion, morality and patriotism."

The laws on family relations and family property were thus to be regulated by the *Shariah*. Now preparation of comprehensive Encyclopaedia of Islamic Law - *Mausu'ah al Fiqhiyah* is expected in Kuwait.[61]

Lebanon

In accordance with the Shariah Court Reorganization law, 1942, all Sunni Muslims in Lebanon are governed, in matters of family law, by the Ottoman Law of Family Rights, 1917 and, in matters not covered by the said law by the select opinion in the Hanafi School.[62] To Shias only those provisions of Ottoman Law apply which do not conflict with the precepts of their own schools of law.

The provisions about amount of *mahr* in the Ottoman law of Family Rights, 1917, are found in Art. 80 of the said law which reads as under:

> *Mahr* can either be specified (*mahr al-musamma*) or it may be the proper *mahr* (*mahr al-mithal*). Proper *mahr* in respect of a woman, shall be that of her equals on her paternal side, and if there is no such person it shall be equal to that of the women of her status in her town. Any amount may be specified as *mahr*.

Israel

In the territory now forming the State of Israel, the Ottoman law of Family Rights, 1917, had been adopted and made applicable to the local Muslims by an ordinance issued in Palestine in 1919. It continues to govern the family affairs of Muslims in the new state.

Libya

After revolution of 1969 besides other enactments the law on Women's Rights in Marriage and Divorce 1972-73 was passed. Its provisions are silent about *mahr*, Islamic law will apply in this area because the Revolutionary Command Council of Libya has declared that in future the *Shariah* would be the principle source of all legislations in Libya.[63]

Morocco

In Morocco the Maliki School of Islamic Law had, from its very beginning a deep influence and has always been exclusively followed by Moroccan Muslims in respect of Family law. The legislation in this field was also based on the doctrine of public interest (*Masaleh al-Mursala*) of the Maliki jurists. Art. 17 of the Code of Personal Status, 1958 (*Mudawanah al-Ahwal al-Shakhsiyah*) incorporates the general rule of *Shariah* about the subject matter and amount of *mahr* in following terms:

> Anything that may be the subject of a legal obligation may form the *mahr*; there is no maximum or minimum thereof.

Article 23 provides:

> Where a legally major girl agrees to *mahr* which is less than her proper *mahr* (*mahr-al-mithal*) her guardian cannot object to it.

Sudan

Before Sudan formed a part of the Ottoman Empire the Maliki and Shafi'i Schools of Islamic law were prevalent there. Later the Hanafi legal system became dominant and remained in that position till the enactment of the Shariah Courts (Organization and Procedure) Regulations, 1915. This regulation recognized the power of the Grand-*qadi* of the country to direct the application of non-Hanafi doctrines to any particular matter superseding the principles of rigid *taqlid*.[64] Till now the *Manshurat*, which have been issued by the *Qadi-al-Qadat*, contain following provisions about the amount of *mahr*:

> Where there is a dispute regarding the amount of *mahr*, unless the wife can prove otherwise the husband's statements on oath shall be accepted; but if he states an amount which cannot normally form *mahr* of a woman of wife's status, the proper *mahr* shall be binding on him.[65]

> The consent and approval of a girl who has attained puberty is essential for the choice of her husband as well as for the amount of *mahr*.[66]

> Silence of a virgin on the choice of the bridegroom and the amount of *mahr* shall amount to her consent and her assertion that she did not know that silence would mean consent shall not be accepted unless she is mentally weak.[67]

Syria

In Syria, the Ottoman law of Family Rights, 1917 survived upto 1953 when it was replaced by the Syrian Code of Personal Status (*Al-Qanun al-Ahwal al Shakhsiyah*), 1953. The Syrian Code of Personal Status, 1953 after its amendment in 1975 contains provisions about the quantum of *mahr* and the increase or decrease of *mahr*. According to this the amount of *mahr* in an irregular Marriage will be:

> "The proper or specified *mahr* whichever is less" [68]

About the increase or decrease of *mahr* the Syrian Code of 1953 provides as given below:

> Increase or decrease in the amount of *mahr*, whether during the subsistence of marriage or during *iddat* shall be void if not made in the Court where this is done by mutual consent. The action must be duly registered with the *qadi*."[69]

Tunisia

Emerged as an independent nation in 1956 and became republic in 1957. The Maliki School of Islam has enjoyed predominant following, though Hanafi School has also made some place later. The Tunisian Uniform Code of Personal Status, 1956 called the *Majallat al-Ahwal al-Shakhsiyah*, was enforced on Ist January, 1957. The code as amended upto 1981 provides about the amount of *mahr* as follows:

> Anything which is lawful and has a monetary value may form the *mahr*. It cannot be a valueless thing, nor is its maximum limited. *Mahr* is wife's property which she may dispose of as she wishes.[70]

Yemen (North)

The Arab Republic of Yemen is the accredited centre of the Zaidi School of Islamic Law. The non-Zaidi Muslims are followers of the Shafi'i School. The provisions of the Family law of 1978 are in conformity with the established Zaidi-Shafi'i law. It declares in Art. 159 that the 'dominant principles of the *Shariah*' be regarded as its parts for matters which it did not provide for. The Code is silent about the amount of *mahr*.

Yemen (South)

There the Shafi'i School of Islamic law has been dominant. During British period the local customary law was often enforced in preference to *Shariah* denying the women the rights under *Shariah*. After winning independence in 1967, the Constitution was promulgated in November, 1970. By an amendment of this Constitution in 1978, it was declared:

> The State shall promote marriage and establishment of Family. The law of Family Relations shall be organized on the basis of equality between men and women in rights and obligations.[71]

In 1974 the National Legislature enacted the family law — *Al-Qanun al-Usrah*. It put an end to customary law and enforced certain striking provisions relating to polygamy, *mahr* and divorce. About the amount of *mahr* it provides under Article 17 and 18 as follows:

> The *mahr*, inclusive of both prompt and deferred parts shall not exceed one hundred *dinars*.[72]

> Both the parties to the marriage shall contribute to the expenses of marriage and the requirements of the matrimonial home in conformity with their respective resources.[73]

> It is not lawful to pay any money in respect of marriage against the provisions of Article 17 and 18.[74]

Afghanistan

Hanafi law has been dominant in Afghanistan as the vast majority of Muslims there is Hanafi. In 1930 a group of Afghan Jurists had published an unofficial code titled *Tamassuk-al-Qada* (Judicial Compendium) based on a selection of the Hanafi legal principles. The *Fatawa-i-Alamgiri* and the Turkish Civil Code 1876 (*Majallah*) were used by them as their source materials.

A marriage law — *Qanun-i-Izdiwaj* — adopting even non-Hanafi principles came into force in Afghanistan in 1350 A.H. (1971 A.D.). It was based on Egyptian law of Personal Status, 1929 and also had some provisions similar to the Dissolution of Muslim marriage Act enacted in 1939 in undivided India. After 1977 the notable provisions of Personal law enactments in Afghanistan relate to the following:

i) Compulsory registration of marriages;
ii) Family Court's prior permission for bigamy;
iii) Judicial intervention for effecting a *talaq* or *khul'*;
iv) Availability of Judicial divorce to the wife on a number of specified grounds;

v) Divorced mother's right to custody of children;
vi) Recognition of women's civil status on a footing of equality with men.[75]

The amount of *mahr* seems to have been left to be determined as per the prevalent practices among the people of Afghanistan mostly Hanafis.

Bangladesh

The Muslims of Bangladesh are mostly Hanafis. It was part of undivided India upto 1947 and that of Pakistan up to 1971. It has retained all the pre-liberation laws. The only notable legislations in the field of Family law are regarding dowry prohibition and restraining of child marriages. About *mahr* the statutory position is same as in Pakistan.

Iran

After Islamic revolution of 1979 the uncodified Islamic Personal Law has now been restored for the Ithna Ashari Shiah majority and the Sunni minorities.

Pakistan

The predominant Sunni majority in Pakistan follows the Hanafi School of Islamic law. The Ithna Ashari, Shafii, Ismaili and non-Muslims are in minority. Pakistan shares its legal history with India upto 1947. The first significant legislation in the area of family law has been the Muslim Family Law Ordinances, 1961. This ordinance sought to secure compulsory registration of marriages, control over polygamy and divorce, reformation of the principles relating to *mahr* and maintenance of wives and recognition of inheritance rights of orphaned grand-children of deceased persons in their estates. It also amended the pre 1947 Child Marriages Restraint Act, 1929 and the Dissolution of Muslim Marriages Act, 1939, in respect of age of marriages for females. The Family Law Ordinance 1961 is silent about the amount of *mahr* itself though section 10 of the Ordinance provides that:

> Where no details about the mode of payment of *mahr* are specified in the *nikahnama* or the marriage contract, the entire amount of *mahr* shall be presumed to be payable on demand.

Tahir Mahmood comments on this saying:

> "This rule of presumption relating to the time for the payment of *mahr* is supported by the Ithna Ashari School of Islamic Law."[76]

Somalia

Somali Muslims have generally been following the Shafii School of Islamic Law in the matter of personal status and family relations. In Somalia, after it emerged as an independent state in July 1960, the Somalian Socialist Government declared enacted a new family Code in 1975. The Code of 1975 declared the dominant opinion in Shafii school and general principles of Islamic law and social justice to be the residual law.[77] About *mahr* is provides:

> The bride shall be entitled to *mahr* as determined at the time of marriage. The upper limit for *mahr* is SO Sh. 1000 or its value in kind.[78]

Commenting on this Tahir Mahmood opines that:

> In principle the wife's right to *mahr* in *Shariah* is protected by Somalian enactment. It, however, includes two such innovations which make this right a mere token. It is provided that *mahr* must be fixed at the time of marriage leaving no room for *mahr al-mithal* and the upper ceiling of one thousand Somali shillings (or its equivalent in kind) on *mahr*.[79]

He further comments that:

> This ridiculous ceiling (1000 Somali Sh = £ 80, i.e. less than 1500 IR) defeats the very purpose of *mahr* under the socio-legal strategy of Islam. It also makes quite meaningless the Somali statutory protection of the traditional rules relating to choice between 'prompt' and 'deferred' *mahr*, wife's right of remitting the *mahr* and the amount of *mahr* payable in the cases of marriages dissolved before consummation.[80]

Brunei Darussalam

The Muslims of Brunei have been following the Shafii Law in all matters relating to marriage, divorce, family relations, succession and religious usages. In 1912 and 1913 enactments regarding administration of Islamic legislations were made. These were repealed and replaced by a new law — The Religious Council, State Customs and Kathis Courts Enactments, 1955. Under the law of 1955 in Brunei besides *mahr* (locally called *mas-kahwin*) there is a practice to give a wife optionally at the time of marriage also some items of gift called *pemberian*. *Mahr* has been connected with the payment of damages for breach of promise to marry.

Section 136 of the law of 1955 reads as under:

> If any person shall, either orally or in writing, and either personally or through an intermediary, have entered into contract of betrothal in accordance with Muslim law and subsequently refuses without lawful reason to marry the other party to such contract such other party being willing to perform the same the party in default shall be liable, if a male, to pay as damages the amount of *the mas-kahwin* which would have been payable together with other monies expended in good faith in preparation for the marriage, or if a female, to return the betrothal gifts, if any, or the value thereof and to pay as damages the amount of such other monies as aforesaid; and the same may be recovered by action in the Court.[81]

Malaysia

Muslims of Malaysia are the followers of Shafii School of Islamic Law. Some ancient customs known as the *adat* have survived and are being adhered to by the Muslims of Malaysia alongwith the law of Islam. Under the Islamic Family Law (Federal Territory) Act, 1984 besides *mahr* (locally called *mas-kahwin*) some items of gift are also payable. Section 21 of the Act contains some relevant provisions as follows:

> 21(1) The *mas-kahwin* shall ordinarily be paid by the man or his representative to the woman or her representative in the presence of the person solemnizing the marriage and at least two other witnesses;
>
> 21(2) The registrar shall, in respect of every marriage to be registered by him, ascertain and record:
>
> a) the value and other particulars of the *mas-kahwin*;
> b) the value and other particulars of any *pemberian*;
> c) the value and other particulars of any part of the *mas-kahwin* or *pemberian* or both that was promised but

not paid at the time of the solemnization of the marriage, and the promised date of payment; and

d) particulars of any security given for the payment of any *mas-kahwin* or *pemberian*.

3. Indian Legislation

a) Oudh Laws Act, 1876

About excessive stipulation of *mahr*, provisions were incorporated in the Oudh Laws Act for application in the territory under the former Oudh State. The Allahabad High Court in *Mirza Munawar Ali Beg V. Smt. Itrat Masood* (1982 All. L.J. NOC. 5) has now declared this legislation as violative of articles 14 and 15 of the Constitution of India. We, however, prefer to discuss it for academic interest. By virtue of these provisions, the Courts could, in the cases where excessive *mahr* was stipulated, allow by decree only a reasonable amount of *mahr* with reference to the means of the husband and the status of the wife. Section 5 of the Act provides:

> Where the amount of '*mahr*' stipulated for in any contract of marriage by a Muslim is excessive with reference to the means of the husband, the entire sum provided in the contract shall not be awarded in any suit by a decree in favour of the plaintiff, or by allowing it by way of set-off, lien or otherwise, to the dependant, but the amount of the '*mahr*' to be allowed by the Court shall be reasonable with reference to the means of the husband and the status of the wife. This rule shall be applicable whether the suit to enforce the contract be brought in the husband's life or after his death.

The provision was applicable to all the local Muslims, to whichever school of law they might belong.[82] It, however, applied only if the husband was a resident of Oudh. Where a man coming from outside Oudh married a woman of Oudh, it would have no application.[83] The husband's ability to pay *mahr* was considered by the Courts at the time *mahr* was claimed and not at the time of marriage.[84] The provisions, however, affected only *mahr al-musamma* (specified *mahr*) and not *mahr al-mithal* (proper *mahr*).[85]

b) Kazimi Act, 1939

The Act is a piece of declaratory legislation which crystallizes a portion of Muslim law relating to dissolution of marriage. Its official

name is Dissolution of Muslim Marriages Act, 1939. Under this Act a woman married under Muslim law is entitled to obtain a decree for the dissolution of her marriage on any one or more of the given grounds like missing-husband, non-maintenance, husband's imprisonment, impotency, insanity, disease, cruelty, etc. Section 5 of the Act points out expressly that no provision of it shall in any way affect the rights of women to *mahr* under Muslim Law. A reading of the Section which exists in the following terms will make it clear:

> Nothing contained in this Act shall affect any right which a married woman may have under Muslim Law to her '*mahr*' or any part thereof on the dissolution of her marriage.

c) Procedural Laws

Civil Procedure Code, 1908

Order XXXII-A of the Civil Procedure Code, 1908 makes provisions providing the procedure for suits relating to matters concerning the family.[86] Mainly it provides that the proceedings may be held in camera and an endeavour shall be made by the court in the first instance to assist the parties in arriving at a settlement in respect of the subject-matter of the suit. The Court may also seek the assistance of a welfare expert whenever thought fit. Since these provisions apply to any suit or proceeding relating to the matters concerning the family in respect of which the parties are subject to their personal law, the Court may adopt the same measures for the settlement of disputes concerning *mahr*.[87]

Order XXXII of the Civil Procedure Code, 1908 provides that every suit by a minor shall be instituted in his name by a 'next friend'.[88] Where the defendant is a minor, the Court is required to appoint for him or her a 'guardian for the suit' called the guardian *ad litem*[89]. Till 1976 these provisions were silent about the definition of 'minor' as used here. The question before the Courts, therefore, was that when a Muslim boy or girl who was major at Muslim Law (having attained puberty) but not having attained the prescribed majority age under the Indian Majority Act, 1875, instituted a suit in respect of which the Muslim law formed the rule of decision whether the aforesaid provisions of the civil procedure code applied or not?. The judicial opinion on the point was divided[90]. But by the Code of Civil Procedure (Amend-

ment) Act, 1976, a definition of 'minor' was added to Order XXXII of the Code as follows:

> 'Minor' means a person who has not attained his majority within the meaning of Section 3 of the Indian Majority Act, 1875, where the suit relates to any of the matters mentioned in clauses (a) and (b) of Section 2 of that Act or to any other matter."

The matters mentioned in clauses (a) and (b) of Section 2 of the Indian Majority Act are:

a) marriage, 'dower' (mahr), divorce and adoption;
b) religion or religious rights and usages of any classes of citizens of India.

Thus in all cases including marriage, *mahr*, divorce, adoption, religion or religious rights and usages the parties to a suit would be deemed to be minor if they have not reached the statutory age of majority, as laid down in Section 3 of the Indian Majority Act and will, therefore, need a 'next friend' or 'guardian for the suit', as the case may be.

Limitation Act

The former Limitation Act, 1908 (now replaced) laid down that the period of limitation for filing a suit to claim unpaid *mahr* would be as detailed below:

a) *mahr al mu'ajal*— three years from the date when the *mahr* demanded but refused.[91]

The court has held that both demand and refusal must be unambiguous;[92] but demand and refusal were no conditions for filing a suit in case of 'prompt' portion of *mahr al-mithal*.[93]

b) *mahr al Maw'ajal*—three years from the date of dissolution of marriage.[94]

The new Limitation Act, 1963 (now in force) contains no specific provision relating to enforcement of *mahr*. The Courts may, however, apply the old rules under the residuary provision contained in article 113 of the new Act.

4. Case Law in the Subcontient

The judiciary, in the sub-continent, has not only adopted the basic dicta given by earlier authorities on Muslim law for decision making in the area of *mahr* but has also made an effort to evolve some befitting principles on the said subject to meet the local situations. A review of these judicial deliveries helps to know as regards *mahr* not only the principles adopted by the Courts but also the common usages and practices prevalent among the Muslims of the subcontinent. These cases are classified below under different heads:

a) Minimum *mahr*

Regarding minimum *mahr* the judgment of Knox and Karamat Hussain JJ. in *Asma Bibi*[95] is a valuable exploration. The Court has provided a measure to determine the value of a *dirham* in the following lines:

> "A *dirham* is a silver coin usually weighing from 45 to 50 grains, rather heavier than an English six-pence."
>
> "Ten *dirhams* according to one account make about eight shillings and eight pence sterling".

The measure has helped the Courts to calculate the amount of *mahr* in local currency. So when the present case was decided the value of a *dirham* was settled to be between three and four *annas* and on this basis the *mahr* of Fatima (RA), the daughter of the Prophet (S.A.W.) which was 500 *dirhams* was calculated as amount approximately to Rupees 107 of the British coin.

b) Maximum *mahr*

The matter regarding maximum *mahr* in the Indian context was discussed, one after another, by the Division Bench as well by as by the Full Bench of the Allahabad High Court in *Sughra Bibi*[96]. The Court was confronted with a situation where the husband on his marriage, being in poor circumstances, fixed a 'deferred' *mahr* of Rs. 51,000.00 upon his wife, and died without leaving sufficient assets to pay such *mahr* and his wife sued to recover the amount of such *mahr* from his estate. The wife sued in *forma paupris*. The defendant's

contention was that the wife is not entitled to recover the whole of mahr from her husband's estate, without reference to his circumstances at the time of marriage or the value of his estate at his death; the plaintiff, under the circumstances, was only entitled to a reasonable amount of *mahr*. The Stuart, C. J. (Pearson, J. dissenting) raised the following important question as to:

> "Could a woman herself a pauper, seek to recover a 'mahr' to the extent of Rs. 51,000 although when the settlement of this 'mahr' was supposed to be made, the husband had not a rupee in the world to call it his own.[97]

He expressed a desire to reduce *mahr* to husband's possibilities" which could be appealing to one's 'sense of justice' and falling within intellegible acceptance 'among rational beings'. He described the present case as beyond the reach of 'intellectual apprehension' with the facts of intangible nature'. The suggested law to him was 'visionary'. To support the contention that *mahr* cannot be decreed in favour of a wife without reference to the husband's financial strength, he argues:

> 'Mahr' is said to be 'incumbent' on a husband; but how can it be incumbent on him, that is, imposed on him as a duty and obligation if the thing to be done is an impossibility, and that it relates to money and property which have no existence..[98]

He made an analogical reference to the following rule:

> When something is mentioned as '*mahr*' which is not in existence at the time, as far instance, the future produce of certain trees or of certain land, or the gains of a slave, the assignment is bad and the woman is entitled to her 'proper' *mahr* (*mahr* appropriate to the wife's family and social position.)[99]

Stuart C.J., commenting upon the general rule that the *mahr* is unlimited in amount points out:

> But it is not said that it is unlimited irrespective of the actual extent and value of the husband's property.[100]

Referring to the expression usually used to denote the minimum *mahr*, that is, 'the *mahr* must be capable of appreciation — not totally destitute of value like a single grain of wheat', the Chief

Justice raises the query that:

> Why the 'appreciation' should not be equally applied to visionary or impossible 'mahr', to the case for example, of the husband not having himself a single grain of wheat but yet settling a 'mahr' of Rs. 51,000 on his wife.[101]

As to the argument that higher *mahr* is intended to (a) compensate a Shia childless widow who is precluded from taking any share from the estate of her deceased husband; and (b) protect wives from capricious declaration of *talaq*, he said:

> [The] difficulty could be met by an express settlement which would give the wife, at the time of marriage a reasonable share of, or if you please the whole of, her husband's property. This doctrine, in short, contended for, of unlimited '*mahr*' infinitely transcends the necessity of the case as stated.[102]

Besides:

> I am unable altogether to appreciate that the consequences of divorce might be fully guarded against by allowing the wife her proper *mahr*, or even such *mahr* as may comprise the whole of the husband's then available estate.[103]

However, when the matter came for consideration before the Full Bench (Pearson, Turner and Spankie, JJ), they concluded differently:

> ['Mahr'is fixed] without regard to the extent of the [husband's] income, and when satisfactory proof is adduced that a settlement of *mahr* has been made bonafide, a lady is entitled to enforce her claim for the whole amount, although it may be in excess of the fortune which on her marriage the husband possessed or could have been expected to acquire.[104]

Pearson, J. explains:

> The plaintiff is doubtless entitled to the whole of the *mahr* which her late husband agreed to give her, and which was fixed not in reference to his means at the time of marriage, but to the value which she possessed in the 'matrimonial market', that value being mainly deter-

mined by the local position and traditions, the surroundings and antecedents of her family. The contract cannot be set aside or treated as a nullity because he was comparatively poor when he married, or has not left assets sufficient to pay the debt, but on the contrary may be enforced so far as is possible.[105]

In the instant case as per Pearson, J. if *mahr* of 51,000 had not been agreed to by the husband even then the wife would have been entitled to a *mahr* equivalent to that amount because such an amount was customarily being fixed as *mahr* for ladies belonging to the family of which she was a member. The claim of the plaintiff was ultimately held by the Court to be maintainable.

In *Collector of Moradabad*[106] the High Court granted a decree for a sum of one crore of rupees and 25,000 gold *'mohurs'* as the plaintiff's *mahr*- debt, though the effect was to deprive the son of the late husband of the plaintiff of all his property. It was said by the Court that:

> "they had no alternative but to pass a decree for the amount of the *mahr* contracted for, however, extravagant that amount might be.[107].

It may be pointed out that the practice of extravagant settlement of *mahr* was common in the families belonging to old aristocracy and still they tried to maintain the tradition of their departed grandeur. The Courts have followed the trend that the settled *mahr* must be decreed. The fact that the bridegroom has neither the present means nor expectations to pay the amount of *mahr* or that the amount is inordinately large is no reason for the courts to decree the suit for a smaller sum.[108]

c) Proof of *mahr*

In *Nujmoodeen Ahmad*[109] it has been held that a customary *mahr* must be proved by showing a custom of the women of the wife's family to receive, rather than of men of the husband's family to pay a certain *mahr*; being the 'consideration' paid by the bridegroom for the marriage and, therefore, regulated by the position and conduct of the bride. As regards the cases where *mahr* is already settled but *kabinnama* is not available or it is not in vogue at a particular place, the claim can be established by oral testimony, the character of which

must depend on the circumstances of each particular case and the nature of the evidence available.[110] In *Zakeri Begum*[111], a register of marriage having been made by a *'mujtahid'* in discharge of his professional duty and kept by *qadi*, was held to be admissible.

A practice discussed above has existed in some localities that the real *mahr*, usually a modest sum is being settled in private while an extravagantly large and fictitious amount is being announced in the public aiming self-glorification (*al-suma't*). In such cases the onus of proving, that the amount of *mahr* publicly announced was never intended to be paid and that only the smaller amount settled in private was exigible, would be on the party making the allegation of fictitious nature of *mahr*. In *Mt. Mohammad Sultan Begum*[112], it was held that:

> [where] there is no evidence as to what was the smaller figure privately fixed, on the other hand a regular *kabinnama* is on the record ... there cannot be any doubt as regards its genuineness, the settled *mahr* must be paid.

In the same case a question was raised that whether oral evidence is admissible to prove that the *kabinnama* was a mere sham and that the amount mentioned therein was nominal and that no effect should be given to it. In this connection Agha Haider, J. ruled that oral evidence to prove such plea was not admissible under Section 92 of the Indian Evidence Act, 1872. It was said:

> I do not think that the evidence of any mental reservation contrary to the explicit terms of the written agreement could be given, as it would practically reduce section 92 of the Evidence Act to nullity.[113]

Further it was observed that:

> To hold that it was open to the defendant to lead evidence to prove that the *mahr* which had been fixed was not really payable would virtually have the effect of cancelling one of the essential terms of the marriage.[114]

However, Tek Chand, J. gives his opinion as follows:

> S. 92 operates as a bar only when oral evidence is sought to be led to vary or modify the terms of an agreement but that the oral evidence is admissible to prove that the agreement in writing was not an agree-

ment at all, but was only a sham and was not intended to be operative.[115]

He relied on the English case *Pym*[116] where Erle J. has drawn a distinction between the two situations as follows:

> "The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there was not an agreement at all is admissible".

Privy Council has taken the view that:

> S. 92 does not fetter the courts power to arrive at the true meaning and effect of the transaction in the light of all the surrounding circumstances.[117]

In the absence of a *kabinnama*, the courts have awarded the claims of the wives on oral evidence but after weighing their claims in the light of the common settlements and proper *mahr*. In *Kulsambi*[118] *mahr* of Rs. 50,000,100*ashrafis* and50 *dinars* was awarded on the oral evidence of three witnesses and no documentary evidence saying:

> "It was not uncommon for the *mahr* for a Muslim wife to be fixed at a figure which is out of all proportion to the husband's means"

Similarly in *Ekram Hussain*[119] *mahr* of Rs. 40,000 was awarded as it was the customary *mahr* among high class Muslims in Bihar when the other party contended that the *mahr* was only Rs. 500.00

Same trend seems to have continued later as is clear from the decision of the Patna High Court in *Mohammad Shahabuddin*[120] where the court has decreed Rs. 40,000 and one gold *mohar* as *mahr* instead of Rs. 500.00 as claimed by the defendant saying:

> The plaintiff belonged to the highest (Siddique) class of *Sheikhs* in Bihar and from the financial point of view also of a good class and the plaintiff possessed all the qualifications of a good wife.[121]

The Court has, therefore, maintained the trend adopted earlier in *Nujmooden Ahmad*[122] that:

> [*Mahr*] should be taken to be regulated by the position and conduct of the bride especially because the Muslims often contract most unequal marriages. It is also recognized that when there is no written contract and a dispute arises at any time regarding the amount of the '*mahr*' the *mahr al-mithal* (*mahr* of the equals) ought to be taken as the standard by which the respective allegations of the parties are to be rested.[123]

An over all view of court deliveries shows an inclination of courts for grant of higher *mahr*. This seemingly has been so because of the fact that courts feel that *mahr* is a check for unilateral exercise of divorce. In *Zakeri Begum*[124] we find that trend as follows:

> '*Mahr*' was high among Muslims, to prevent the husband divorcing his wife in which case he would have to pay the amount stipulated.'

d) Cases under the Oudh Laws Act, 1876

In *Mohammad Shahabuddin*[125], the Court has summed up the practices and trends influencing *mahr* fixation in the subcontinent in the following lines:

> The amount of '*mahr*' is ordinarily fixed by oral contract, and this is valid. There is also no limit either to maximum or minimum of the amount of '*mahr*', although the early Hanafi law givers had fixed ten *dirhams* as the minimum for it and Malikis consider even a smaller sum as permissible. These minima have now become obsolete and the amount of '*mahr*' depends entirely upon other considerations such as the circumstances of the husband and the wife, the necessity of a device to prevent on the part of the husband the arbitrary exercise of the power of divorce vested in him, the position of paternal family of the woman, her intellectual attainment or personal attractions and qualifications, wealth of her husband, conditions of society surrounding her and the desire of self-glorification and vanity on the part of the parties. All these considerations enter into the determination and settlement of the amount of '*mahr*'.

This excessive *mahr* fixation had become so oppressive and unjust to the children of a Muslim by a predeceased wife that in 1876 an Act, called Oudh Laws Act, was enacted, whereby under Section 5 thereof the Civil Courts were given power to fix a reasonable amount of *mahr* where the amount of *mahr* stipulated in any contract of

marriage by a Muslim was excessive with reference to the means of the husband. In such a contingency the entire sum, provided in the contract was not to be awarded in any suit by decree in favour of the plaintiff, or by allowing it by way of set off, lien or otherwise to the defendant. The amount of '*mahr*' to be allowed by the court had to be reasonable with reference to the means of the husband and the status of the wife.

The extent of the application of the Act first came into question in *Rukia Begum*.[126] In this case the marriage had taken place at Lucknow and the *mahr* was fixed at Rs. 1,25,000. The parties being afterwards domiciled in the province of Agra was not sufficient to authorise the courts in the province of Agra to apply to a suit brought by the wife against the heirs of her deceased husband for recovery of her *mahr* the provision of Oudh laws Act, 1876. The preamble of the Act states:

> "An Act to declare and amend the laws to be administered in Oudh."

This indicates that it is only the Courts administering the law in Oudh which could put in force the provisions of the Act.

So far as the extent of discretion exercised by the Courts in reducing the quantum of *mahr* the Courts have manifested unlimited powers. In *Sulaiman Kadr*[127] the Court reduced a claim of ten lakhs to Rs. 25,000 saying that it was "plainly fixed for show". The court also stopped the monthly payments that were being made to the wife. In place of both *mahr* and timely allowance a lump sum amount was fixed so that all the matters between the parties were settled and any future trouble is prevented.

The question as to what should be the standard for re-fixation of *mahr* has been discussed in *Abdul Rahman Khan*.[128] The court observed:

> No hard and fast rule can be laid down on which to assess the amount of '*mahr*' which may be claimed ... it has to be done on the broad lines laid down in the S.5 of the Oudh Laws Act, and the question as to what is reasonable must be determined with reference to the means of the husband and status of wife.[129]

In the present case the *mahr* which was admittedly prompt *mahr* was Rs. 50,000 but in the circumstances of the case Rs. 10,000 was said to be reasonable amount. As to the contention that the '*mahr*' should be fixed with reference to the means of the husband at the time of marriage, the Court said:

> This appears to us to be contrary to the obvious intention of the section (Section 5 Oudh Laws Act)."

As regards the nature of the *mahr* claim the court said:

> The claim for *mahr* is a simple money claim and though the decree may be executed against the husband's property it cannot be charged against any specific portion thereof.[130]

e) Addition of *mahr*

Addition to the amount of *mahr* of the wife was challenged by the heirs of a husband in *Rukaiya Begum*.[131] The Court held that:

> At any time during the continuance of the marriage an addition may be made to the *mahr*. The husband's promise to add to the *mahr*, if accepted by the wife, becomes incorporated into the marriage contract and binds him.[132]

In *Kamarunnisa Bibi*[133], the question was regarding an oral gift of an estate, consisting of certain *taluquas* and *Mauzaz* made by the Muslim proprietor in favour of his wife. The gift was stated as had been made in consideration of *mahr* of a certain amount which had remained unpaid and which had been agreed upon prior to the marriage. The court held the gift effective on the grounds that:

i) It is not necessary to constitute *mahr* under Muslim law, that the *mahr* should be agreed upon before marriage it may be fixed (or enhanced) afterwards; and

ii) Possession of the estate which may be the subject of the gift, if delivered in conformity with the (requirements of the) gift, that handing over of possession would be sufficient to support it, even without consideration.

f) Anomalous Settlements

In *Muhammad Talib Hussain*[134], a Muslim husband and wife of the Shia persuasion referred a dispute relating to the wife's *mahr* to arbitrator, who under a registered award, transferred the absolute ownership of the husband's property in *presenti* to the wife, reserved possession of it to the husband for life with control over the income, and provided, that in the event of the wife predeceasing her husband, he should continue in possession for life while in the event of the husband dying before the wife, she should be the owner and the heirs of the husband could not interfere. Mutation of names followed in favour of the wife, who executed a *mukhtarnama* in favour of her husband for the management of the property conveyed to her under the award. It was held that the award was sufficient to transfer the ownership of the property covered by it in present to the wife, and no conveyance need to have been executed. It was valid under Shia law. The Court said:

> "Mutation alone creates no title, but in the case before us the award made the wife absolute owner of that property and mutation showed that effect was given to the award".[135]

In another case *Mubarak Un-Nissa*[136] a husband made over to his wife, to whom a *mahr* of Rs. 1,25,000 was due, certain property. In the deed of transfer it was stipulated:

i) that the wife was to take possession of the property in lieu of her *mahr* and enjoy the usufruct;

ii) that the property was to revert to the husband if the wife predeceased him, the '*mahr*' debt being deemed to have been discharged; and

iii) that if the husband predeceased the wife the property was to become hers absolutely.

The Court agreed with the contention of the wife that the transaction was not a mortgage and the mere fact that the possession was delivered to the wife did not create any hypothecation of the property for the amount of *mahr*. It was a conveyance of the property in lieu of

mahr subject to the contingency which the court was not called upon to determine. The Court said:

> The interest created was a right to enjoy the usufruct of the property during the lifetime of the husband, which was to develop into full ownership on the happening of a contingency namely, the death of the husband in the life-time of the wife. That contingency has happened ... she has become the absolute owner of the property.[137]

In an another settlement the wife was given possession of some property in lieu of her '*mahr*' and the husband retained possession of some other property for life, which life interest in case of urgent necessity he was authorized to sell or hypothecate, and it was agreed that on the death of the wife the persons who should be the heirs of both would be the owners of the properties. The wife predeceased her husband, who then transferred certain properties in his own right and as heir of his wife. This was challenged by the plaintiff as the properties in the possession of the wife were to devolve on their heirs after her death.

It was argued by the dependents that the agreement was unlawful as the husband could not have relinquished his chance to succeed his wife under section 6 of the T.P. Act. The court held that ------ this was in the nature of a family settlement ... There was no transfer or renunciation of an expectant interest or of a mere possibility.[138]

Section 6 of the T.P.Act provides that:

> "The chance of an heir apparent succeeding to an estate ... or any other mere possibility of a like nature, cannot be transferred."

This clause seems to strike at transfers of a mere possibility or expectancy not coupled with any interest or growing out of an existing property It does not strike at agreements by expectant heirs, such as agreement to divide a particular property in a certain way on the happening of a certain contingency.[139]

In *Haji Mokshed Mondal*[140] in a somewhat similar situation it was held that:

> "the transfer of land in lieu of '*mahr*' is in the nature of *hiba-bil-iwaz*. In such a case even if the *kabinnama* is not registered, if the bride is

put in possession, Section 53-A of T.P. Act will apply and her father-in-law's suit for declaration of title and confirmation of possession must fail.[141]

g) Usage and practice

In India as per the common practice *mahr* is being specified at the time of performing *nikah*. So in most of the cases *mahr* is specified *(musamma)* and the occasions for the application of the rules relating to *mahr-al-mithal* are very rare. As to the minimum amount of *mahr* neither the Hanafi nor the Ithna Ashari standards are being followed. The specification of *mahr* depends upon the following:[142]

i) Circumstances of the husband and the wife;
ii) Status of wife's parents;
iii) Intellectual attainments,qualifications and education of the wife;
iv) Husband's financial status;
v) Social conditions; and
vi) Customs and usage.

Sometimes some more factors influence specification of the amount of *mahr*, such as:

i) desire of self-glorification;
ii) personal attraction, charm and beauty of the wife; and
iii) need to control husband's power to divorce the wife.

5. Law and Usage in Kashmir Valley

a) Muslim Dower Act, 1920

The Jammu and Kashmir Muslim Dower Act, 1920[143], contains provisions similar to one found in Section 5 of the Oudh Laws Act, 1876. It reads:

> Where the amount of '*mahr*' stipulated for in any contract, of marriage by a Muslim is excessive with reference to the means of the husband. The entire sum provided in the contract shall not be awarded in any suit by decree in favour of the plaintiff or by allowing it by way of set-off, lien or otherwise, to the defendant. But the amount of '*mahr*' to be allowed by the Courts shall be reasonable with reference to the means of the husband and the status of the wife.

This rule shall be applicable whether the suit to enforce the contract be brought in husband's lifetime or after his death.[144] Therefore, where an excessive *mahr* has been fixed for the wife the court is empowered by this legislation to reduce this amount reasonably with reference to the means of the husband and the status of the wife. It, however, does not provide for the enhancement of *mahr* where it is found to be ridiculous with reference to the means of the husband and the status of the wife. This state of imbalance mars the merit of this legislation.

The provision applies to all the Muslims of Jammu and Kashmir irrespective of the school of law to which one belongs. On the question whether it applies to cases where a husband from outside Jammu and Kashmir marries a Muslim woman from within there is no judicial pronouncement. It appears that such cases will not be covered by this legislation. This view is based on the analogy drawn from the pronouncement of the Privy Council in a similar situation under the Oudh Laws Act, 1876.[145]

The ability of the husband to pay *mahr* shall be considered by the Courts at the time *mahr* is claimed and not at the time of marriage.[146]

In cases where *mahr* is unspecified the provisions of the Muslim Dower Act, 1920 shall have no application. In such cases the *mahr* is to be fixed by the Courts as per the guidelines prescribed by *Shariah* in this respect. The Muslim Dower Act, 1920 is not applicable to the Muslims of Azad Kashmir. They are governed by *Shariah* under Section 2 of the Azad Kashmir Muslim Personal Law (*Shariat*) Application (Amendment) Act, 1952.

b) J&K Dissolution of Muslim Marriages Act, 1943

The Act provides various grounds on the basis of which a Muslim wife can claim the dissolution of marriage. These include the grounds like missing husband, imprisonment of the husband, non-maintenance, impotency, insanity, cruelty etc. No provision is found in this Act about the effect on right to *mahr* of a Muslim wife by this legislation as is found in the sister Indian enactment.[147] Therefore, about the subject-

matter of *mahr* and its quantum the ordinary rules of *Shariah* remain applicable. In Azad Kashmir the Dissolution of Muslim Marriages Act, 1939 which is applicable in Pakistan has been adopted by the Azad Kashmir adoption of Laws Act, 1959. The provisions of the Pakistan Dissolution of Muslim Marriages Act are almost similar to that of the Indian Act.

c) Local Customs and Usage

In Jammu & Kashmir, the practice has been that the *mahr* is being paid both in terms of cash and kind depending upon the economic background of the family concerned. Even the quantum of *mahr* depends upon socio-economic background of a family. People have sometimes been getting swayed away by fashion and false pride and fix unconscionable amounts as *mahr*. So instances are found where on the one hand some live-stock like ponies, cows or sheep have been fixed as *mahr* for the wife and, on the other hand some huge sums of the money have been fixed as *mahr*. Needless to mention that where ponies, cows or sheep are the subject of *mahr*, their issues are considered to be the property of the wife. In Middle class families, nowadays, the *mahr* ranges from Rupees ten thousand to sixty thousand or so.

The details can be put in the following order:

i) Among affluent families from all places in Kashmir Valley and all the Muslims of urbanized areas *mahr* is usually fixed in terms of money. As per the written evidence available from fifty years before now, the extent of *mahr* has been from Rupees one hundred (or even lesser in some cases) upto Rupees nine hundred. Presently it ranges from ten thousand to sixty thousand.

ii) Among agricultural families the *mahr* is fixed either in terms of money from Rupees three thousand to fifteen thousand or in terms of ponies, cows, sheep, trees, etc.

iii) Mostly the settlement of *mahr* takes place without actual consultations and consent of the bride.

iv) The women are ignorant about the concept of *mahr* and its differences from customary payments like *thān*, *zewar* which

are payments in terms of gold or cash certificates and clothes. It is not being made clear to the brides that how much *mahr* has been fixed and what constitutes her *than* or *zewar*. In many cases *thān* or *zewar* are treated as payments on account of *mahr*, the balance, if any, remaining unpaid.

v) Presently a healthy trend is finding roots in Kashmir. The *mahr* is being fixed in terms of money and paid at the time of *nikah*. It ranges from Rupees one thousand to ten thousand and vary rarely upto Rupees twenty thousand. However, in a considerable number of marriages the extravagant practices of *mahr* still continue.

vi) Earlier in some poor families a practice was prevalent under which some payments were being made by the family of the bridegroom to that of the bride under the name of *kharchai-khandar* (marriage expenditure), *bogh* or *pathil*. This practice was always hated by the people in general but it was continuing due to economic backwardness. Now this practice has almost been abandoned. It is note-worthy that this type of payment was never confused by the people of Kashmir with *mahr*, which they knew is a payment incumbent under *Shariah*.

vii) Actual observations show that the customary practices and usages are losing ground under the influence of growing knowledge of the principles of *Shariah*.

d) Impact of the Muslim Marriages Registration Act, 1980

The Act was passed by the state legislature for compulsory registration of marriages. The main object of the legislation was explained by the then Law Minister Mr. M. A. Beg, while introducing the Bill in the State Legislature, in the following words:

> "The bill seeks to provide for the registration of Muslim marriages, as in the absence of a law on the subject requiring the preservation of the records regarding the solemnization of marriages people are generally dragged to litigation and innumerable difficulties. With a view to remedying the situation, it is proposed to enact a law providing for the registration of all marriages solemnized by the *Nikah* in the state., hence the bill.[148]

The Act, however, did not provide for the registration of divorces which is equally important.

Besides other provisions the Act required that there shall be recorded on every copy of *nikahnama* or memorandum, as the case may be, the amount of *mahr* 'prompt' and 'deferred' separately and also the manner of payment thereof.[149]

The Act was repealed in 1981 because of pressures from different quarters. This proved a legislation on paper only. However, there is already a practice of maintaining written record of the *nikah* and the related matters personally by the parties through *nikahnama*. This continues to be the only evidence available to prove the *nikah* and the other terms agreed to by the parties.

6. Taxation and *mahr*

Mahr in its real nature is a gift to be given to the wife on the occasion of marriage. The question before us is that whether it comes within the purview of the tax laws or not. The relevant statute, the Indian Gift Tax Act, 1958 (as amended upto 1990), in its section 2(xii) defines a gift in the following terms:

> "gift" means the transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration in money or money's worth ..."

The language of the definition is sufficient to cover *mahr* as a subject of gift-tax under the Act. However, section 5(1)(x) as modified in 1990, can ordinarily save it from tax upto the specified limit of rupees one lakh. The relevant provision reads as follows:

> S.5(1):Gift-tax shall not be charged under this Act in respect of the gifts received by any person -
>
> (x): On the occasion of the marriage of such person subject to a maximum of rupees one lakh in value.

So *mahr*, if delivered actually on the occasion of the marriage upto rupees one lakh will be exempted from tax. Its obligatory character at Islamic law will not affect its nature as a gift under gift-tax laws.

It, however, may be noted that after the Bill of 1990 the amount of tax, wherever it is due, is collected from the donees and not from donors.

In Kashmir Valley, in certain cases, *mahr* is being paid in the form of National Saving Certificates, issued under the Government Saving Certificates Act, 1959. These are exempted from tax by section 5(1)(xviii) of the Gift Tax Act. This can be an indirect way of saving *mahr* from tax. The people of Kashmir Valley, however, do not make payments of *mahr* in the form of cash certificates with the intention of tax-exemption but for their personal convenience and benefits.[12]

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4. *Supra* note. 1.
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11. *Supra* note 5.
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13. *Jama-ush-Shittat: Supra* note 3 at P. 440.
14. *Radd-al-Muhtar*, Vol. II. P. 517.
15. *Supra* note 3.
16. *Ibid*.
17. *Supra* note 14.
18. *Supra* note 13.
19. *Supra* note 1 at PP. 72-73l; *Bashir Ali V. Hafiz Ali* 1909 13 Cal W.N. 153.
20. *Dirham* was a silver coin weighing 2.97 grammes.
21. *Supra* note 1; *Mohd Shahabuddin V. Mt. Ummatur Rasul*, AIR 1960, Pat. 511.
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28. *Sugra Bibi V. Masuma Bibi* (1877) I.L.R. 2 All, 537.
29. *Supra* note 3, P. 343.
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32. *Supra* note 3 at P. 465.
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34. The View of Tarfaen in *Sharh-i-Mukhtasar al Tahtawi*, see *Supra* note 3 at P. 460.
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44. *Id*. at P. 73.
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46. *Supra* note 3, P. 438.
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48. *Masalik al-Ifham*, Kitab al-Nikah, Vol. I. PP 48-49 (*Tehran* Ed) English versions taken from the judgement of *Asma Bibi V. Abdul Samad Khan* (1910) 32 All. 167.
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141. *Id* at P. 163.
142. *Supra* note 120.
143. The Act is comprised of two sections only. Section 1 marks the extent of application of the Act and Section 2 is the substantive provision.
144. Section 2 of the J&K Dower Act, 1920.
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147. See Section 5 of the Kazimi Act, 1939.
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Chapter - IV

MAHR : WHEN PAYABLE

1. The Quran and Hadith on the subject

The Quran is not express on the subject as to "when *mahr* is payable". It, however, describes *mahr* as a 'gift spontaneous' which implies its earnest and earliest presentation to the wife. Again *mahr* is described as a "reward" which is given to the wife to bear with some pleasantness the agony and disquietude caused by the separation from parental home and apprehensions about the new matrimonial life. So, in view of its specific nature and purpose, *mahr* demands its immediate fixation, dispassionate specification and keen presentation.

A study of *ahadith* reveals that for the marriages contracted by or in the presence of the Prophet (S.A.W.) the fixation and payment of *mahr* has taken place at the time of marriage itself. It was in this spirit that once Prophet (S.A.W.) made curious inquests from a man who sought the hand of a woman in his (S.A.W.) presence. The Prophet (S.A.W.) asked:

> "Go to your home and see if you have something"
>
> "Look for something even if it is an iron ring"
>
> "How much of the Quran do you know? ... Go I marry her to you for that much of the Quran, which you know, as *mahr*".[1]

It shows that the Prophet (S.A.W.) was keen to see the Divine Will followed by his (S.A.W.) people without any delay with earnestness so that its basic purpose gets served. At the time of the marriage of Fatima (R.A.) with Ali (R.A.) and Prophet (S.A.W.) asked him (R.A.):

> What you have to present as *mahr*? ... What you have done with *huttiya* (name of armour which Ali (R.A.) had got as booty in the battle of

Badr)". "That I have", Ali answered. "Enough, that would do" was the Prophet's (S.A.W.) reply.[2]

From the above references we infer:

a) that the property constituting the subject matter of *mahr* must be preferably readily available for presentation to the wife;

b) that *mahr* must be fixed and presented to the wife at the time of marriages;

c) that even where the nature of the subject matter of *mahr* or some special circumstances demand a gradual discharge of *mahr*, unreasonable delay must be avoided. An instance of this kind of subject-matter can be the 'teaching of the Quran'.

This mode of payment of *mahr* is *ahsan* (the best) and is an appropriate manifestation of the words and deeds of the Prophet (S.A.W.). This trend alone can bring forth the desired results. Any other way adopted to perform the obligation of *mahr* will naturally be lacking desired "earnestness" and such mode of payment of *mahr* can be described as inappropriate with improper results. In such cases, sometimes, *mahr* remains unspecified and unpaid even upto the dissolution of marriage or death. The Quran, however, has chosen to provide sufficient guidance to meet out such irregularities also which may emerge due to delay in fixation and payment of *mahr*. It says:

> " ....if you divorce women before consummation or the fixation of their *mahr* bestow on them (a suitable gift)"[3]

> "And if ye divorce them before consummation but after the fixation of *mahr* for them, then half of the *mahr*, unless they remit it or is remitted by him in whose hands is the marriage tie."[4]

The cumulative effect of all the given references is that the payment of *mahr* must be prompt but for sufficient reasons the fixation and/or payment of *mahr* may be deferred with the *free consent of the wife*.

2. Juristic Formulations

Based on the principle of freedom of stipulation the jurists have developed a meticulous scheme which accommodates all the possible situations regarding payment of *mahr*. The details are given below:

a) Propositions about the time for payment of *mahr*

The parties to a marriage may agree to any of the following propositions.[5]

i) that the whole of the amount of *mahr* may be paid at the time of marriage or soon thereafter;

ii) that the whole of the *mahr* will be payable on demand (*indat-talab*).

iii) that a specified portion of the *mahr* will be paid at the time of marriage or when the wife demands it; and the rest of it on the happening of a specified event (e.g. husband's death if the wife survives him; wife's death if she is survived by the husband' or dissolution of marriage, if any, during the life time of the parties) or after a fixed period of time.

iv) that the whole amount of *mahr* will be paid on the happening of a specified event or after a specified period of time as illustrated in (iii).

As per this scheme *mahr* has been classified into three categories:

i) *Mahr al-mu'ajjal*: The *mahr* or a portion of *mahr* which is made payable at the time of marriage or soon thereafter, or when demanded by the wife is described as *mahr al-mu'ajjal* - endered into English as 'prompt *mahr*'.

ii) *Mahr al-muw'ajjal*: The *mahr* or a portion of *mahr* which is made payable on the happening of a specified event is described as *mahr al-muw'ajjal* or *ghayr-mu'ajjal* - rendered into English as 'deferred *mahr*'.

iii) *Mahr ghayr muqatta*: When indeterminate stipulation of *mahr* takes place and it is not clear that how much of the *mahr* is prompt and how much deferred. The *mahr* can be said to be *ghayr muqatta*. It includes the cases where no time is specified for the payment of *mahr* or where its nature is described only in general terms.

Under Shia law in such cases the whole of the *mahr* is treated as prompt[6] whileas under Hanafi law the prompt portion of *mahr* is determined having regard to the qualifications of the woman, the quantum of *mahr* fixed and the local custom (*urf*)[7]. The rule has been laid down by all the revered authorities on *fiqh*. The relevant text from *Radd-al-muhtar*, reads:

> When nothing is mentioned as to what portion should be prompt and what portion deferred regard must be had to *urf* (custom)...[8]

To the same effect is another passage from *Mukhtasar al-Wiqayah*:

> If there is specification as to *mahr* being *mu'ajjal* or *muw'ajjal* it will be given effect to, if not, reference will be made to custom.[6]

The *Fatawa-i-Qazi Khan* and the *Fatawa-i-Alamgiri*, give the rule in the similar terms:

> If nothing is specified (how much is prompt or how much deferred) regard must be had to the (qualities of) women and the *mahr* named in the contract of marriage to determine how much of it should be prompt for such a woman out of such *mahr* and should be treated as immediately demandable. It must not be considered to be one fourth or one fifth, but regard should be had to custom.[10]

In case whole of the *mahr* is said to be deferred then the guidance is found in the following lines from *Fatawa-i-Qazi Khan*:

> A man marries a woman with a *mahr* of one thousand (*dirhams*) and the whole of it is said to be deferred, if the time (to which payment is postponed) is known, the postponement is valid; if not, it is not valid. And when postponement is not valid, the husband must be ordered to pay promptly that portion which by the custom of the people of the town (locality), is recognized as prompt, and the balance shall be realized from him after divorce or death.[11]

Ameer Ali, referring to *Sharah-i-Wiqayah* says that this is the rule adopted by the later jurists (*al-Muta'khirin*) and *Macnaughten* is incorrect in saying that when there is no specification the whole *mahr* must be regarded as prompt.[12]

b) Enforcement of mahr

i) Non payment of prompt mahr and refusal of conjugal rights

The several works on Islamic Law provide various rules about the enforcement of *mahr* by or on behalf of women. *Hedaya* says:

> The wife has the right to deny her person (to her husband) or to go on a journey with him until she receives the *mahr* ... The husband has no power to prevent her from travelling or going out of his house until he has paid the whole exigible *mahr*.[13]

Text from *Tanwir al-Absar* reads:

> It is lawful for the wife to refuse cohabitation in order to exact payment of the *mahr* or that portion of it which is payable immediately.[14]

On this passage the author of the *Radd al-Muhtar* comments as follows:

> If the husband has paid the *mahr* to his wife, but one *dirham* is owing, for that even the woman can refuse co-habitation .. If the woman has assigned the *mahr* to somebody, she may refuse co-habitation until it has been delivered to her assignee, but not if the assignment has been made to the husband himself.[15]

Durr al-Mukhtar clearly lays down that -

> "The right (to refuse conjugal rights) is for the purpose of obtaining what has been stated as prompt *mahr*, whether wholly or partly".[16]

Whether the wife can refuse conjugal rights to the husband for non-payment of deferred *mahr* or not, the authorities seem to hold some contrary views. One view is that if the whole *mahr* is deferred, it is not for the wife to deny her person to the husband. Imam Abu Yusuf holds a contrary view in this respect. In *Durr al Mukhtar* it has been explained as follows:

> "According to the second (Abu Yusuf) if *mahr* is deferred to *indeterminate time*, the woman has a right to refuse cohabitation and on this is the *fatwa* according to *istehsan*."[17]

Another situation is where the husband has already cohabited with the wife before payment of *mahr*, according to Abu Hanifa the wife has even then the right to refuse conjugal rights until payment of *mahr*. But according to Imam Abu Yusuf and Imam Muhammad she has not the right in such a case to deny herself if the cohabitation has been with her consent. If she was forced or is an infant or insane her right of denying herself is not extinguished by cohabitation. Texts from various authorities read as follows:

> It is the wife's right to prevent the husband from connubial intercourse, and that which is implied therein, and from journeying with her, even after connubial intercourse and 'retirement' to which she has consented ... The right is far the purpose of obtaining what has been stated as prompt *mahr*.[18]

Tanwir al-Absar contains the same view:

> The woman can refuse to accompany her husband on travel or to cohabit with him until payment of her prompt *mahr*, even though the refusal takes place after there has been a 'valid retirement' or cohabitation with her consent ...[19]

The other works like *Fatawa-i-Kazi Khan*,. the *Fatwa-i-Alamgiri* and *Rudd al-muhtar* contain almost similar texts on the point which provide as follows:

> When the husband has had connubial intercourse with his wife, or there has been 'valid retirement' with her., the whole *mahr* is confirmed. If she desires to deny herself to him in order to secure fulfilment of exigible *mahr* it is her right to do so according to him (Imam Abu Hanifa), but this is opposed to the opinion of the other two (disciples) ...[20]

The consensus and spirit of the law is leaning towards the view of Imam Abu Hanifa.

ii) Deferred *mahr* when and how realizable

Deferred *mahr* can be claimed by the wife on the dissolution of marriage or on the happening of the specified event, whichever ensues first. She has a vested interest in the subject matter of *mahr* though its delivery is deferred by her consent. Actual possession is not

necessary to enable the wife to exercise her rights over the portion of *mahr* deferred. Deferred *mahr* is a *chose in action* and a woman can assign it to any one who may recover the same when it becomes due from the husband or his estate.[21]. The *Sharaya* says:

> "The *mahr* becomes the property of the wife by mere marriage and she may deal with it in any way she likes, even before she has obtained actual possession of the subject matter".[22]

She can make a gift of the *mahr* either to her husband or to a stranger or she may exchange it for any other property belonging to the husband.[23] None of the guardians, not even the father, has a right to object to her so doing.[24]

Thus wife may exonerate her husband either from the payment of the whole or a part of *mahr*. But in order to be valid the exoneration must be made while she is in god health and of sound mind. When a woman is on death-bed, she generally discharges the husband from the unpaid *mahr*. Such 'discharges' may be treated by the courts as death-bed gifts. *Fatwa-i-Alamgiri* says:

> "It is necessary for a discharge to be valid that she (the wife) should not be sick of death illness at the time of giving her consent. She must, of course, be *sui juris*."[25]

A father or grand-father may make any abatement in *mahr* of a daughter in favour of the husband under Shia law[26] but not under Hanafi law.[27] Such abatement would be valid, unless there is a reason to believe that it was done fraudulently. However, even under Shia law in no circumstances, can either the father or grand-father discharge the husband of a minor daughter from the whole liability.[28]

3. Legislation in Muslim Countries

The first official code of Islamic Family law, the Ottoman Law of Family Rights, 1917 which is now applicable in Lebanon and Israel contains the following provisions regarding the time for payment of *mahr*.

> Section 81: The specified *mahr* may be made either prompt (*Mu'ajjal*) or deferred (*muw'ajjal*) wholly or partly.

Section 82: Where the period for the payment of deferred *mahr* has been fixed, the wife cannot claim its payment before that time even if a divorce take place; but if the husband dies the period so stipulated lapses. If no period is specified for the payment of the deferred *mahr*, it shall be deemed to be deferred till the occurence of the death of either party or divorce.

Section 83: Where the *mahr* has. in a valid marriage, been specified, its payment in full becomes binding on the death of either spouse or on divorce after 'valid retirement' (*khalwat al-sahih*). If a divorce occurs before such retirement half of the specified *mahr* shall be payable; where separation takes place on the initiative of the wife, e.g., where her guardian claims dissolution of the marriage on the grounds of inequality of the husband, the *mahr* shall lapse in full.

Section 84: Where no *mahr* is specified in a valid marriage contract or is specified but the specification is incorrect, the proper *mahr* shall be payable on the death of either spouse or on the occurance of divorce after 'valid retirement'. When a divorce occurs, in such a case before 'valid retirement' , *mata'* (a consolatory gift) shall be payable. The amount of *mata* shall be determined in accordance with custom and usage but it shall not exceed half of *mahr*.

Egyptian legislation on Personal Status is silent about this aspect of *mahr*. Same is the position in Sudan. The JordanianLaw of Family Rights, 1951, now replaced by the Code of Personal Status, 1976 has incorporated in the Jordanian Law, a provision regarding the subject in Section 43 which reads as follows:

> Where the wife has received her *mahr* or where the parties have agreed to *defer the payment of mahr for a stipulated period*, the wife cannot refuse consummation of marriage.

If the *mahr* has been deferred till indeterminate time the statute is silent about the situation. Jordanian law, however, gives an additional right to the wife to claim dissolution of marriage on account of non-payment of prompt *mahr*, provided the marriage is still unconsummated. Section 55 of the law of 1951 provides:

> Where the marriage has not yet been consummated and the husband is unable to pay the prompt *mahr*, the wife can bring an action for the dissolution of the marriage. The *qadi* shall there upon give one month's time to the husband and if he fails to pay it within that period, the marriage may be dissolved. If in such a case, the husband is absent, or if his whereabouts are not known, or if he has no property in the place, the marriage may be dissolved forthwith.

As regards the matter when *mahr* is not specified to be either prompt or deferred the Article 45 of the Jordanian Code of Personal Status, 1976 provides:

> It is lawful to make the *mahr* prompt or deferred -- the whole or part of it -- as specified in the certificate of marriage ; when it is not so specified to be deferred, it shall be regarded as prompt.

SyrianLaw of Personal Status, 1953, approves the wife's right to refuse cohabitation indirectly while making it incumbent upon the wife to live with the husband only after receiving her prompt *mahr*. It is provided in section 66 of the law of 1953:

> The wife must, after receiving her prompt *mahr*, reside with her husband.

The Tunisian Code of Personal Status, 1958, approves the wife's right to refuse consummation of marriage for non-payment of *mahr* but it has preferred the views of Abu Yusuf and Muhammad to that of Abu Hanifa regarding the wife's right to refuse cohabitation after consummation of marriage. The relevant provision 13 of the Tunisian Code reads:

> The husband cannot, unless he pays the *mahr*, force the wife to consummate the marriage. After a marriage is consummated *mahr* shall constitute an unsecured debt of which only the wife can claim payment.

The Moroccan Code of Personal Status, 1958, through its section 24 provides:

> Where there is a dispute between the spouses as to the payment of *mahr*, the wife's claim shall be accepted if the dispute arises before the consummation of marriage. But if it arises after that, the husband's statement shall be accepted.
>
> Among other things the provision implies that the wife can refuse consummation of marriage on account of her demand for *mahr* from the husband before submitting herself to him.

Iraqi law of Personal Status, 1959, incorporates the rule about 'when *mahr* is payable', in its section 20, in the following words:

> *Mahr* may be made either prompt or deferred, wholly or in part, where no specific provision is made, custom shall prevail.
>
> The period fixed in the marital contract for entitlement to the deferred *mahr* shall lapse on death or divorce.

Regarding enforcement of *mahr* by refusing consummation of marriage and co-habitation with the husband the statute is silent. The classical law will apply to such cases.

In Pakistan, the relevant statutory law is found in Section 10 of the Muslim Family Law Ordinance, 1961, which provides that:

> Where no details about the mode of payment of *mahr* are specified in the *nikahnama* or the marriage contract, the entire amount of *mahr* shall be presumed to be payable on demand, that is, prompt.

3. Indian Law and Judicial Decisions

As regards the time for payment of *mahr* the uncodified Muslim law is applicable in India and no legislation is affecting that so far. However, the judiciary has adopted certain principles for the settlement of claims about the time for the payment of *mahr* which are given below.

a) General Propositions approved by the Courts

The parties to a marriage may adopt any of the following propositions:

i). that the whole of the *mahr* will be payable when the wife demands it (*indat-talb*);[29]

ii) that a specified portion of the *mahr* will be paid at the time of marriage or when the wife demands it; and the rest of it on the happening of a specified event (death or divorce);[30]

iii) that the whole of the *mahr* will be payable on the happening of a specified event.[31]

When no stipulation regarding the time for payment of *mahr* is made by the parties the following norms have been adopted by the Courts:

i) The whole *mahr* 'may' be regarded as prompt;[32]
ii) the whole *mahr* 'must' be regarded as prompt;[33]
iii) that only a part of the *mahr* is presumed to be prompt;[34]

When *mahr* shall be divided into two parts one 'prompt' and the other 'deferred' the ratio of the two portions be determined with reference to the usage of the family, if any, or (in the absence of usage) with regard to status of the parties and total amount of *mahr*.[35] In the absence of any usage, the presumption will be that half of the *mahr* is prompt and the rest deferred.[36]

b) Some judicial considerations about specified matters

Husband's financial dificulty

Where a wife finds her husband in financial difficulty she can lawfully accept from him some property on account of *mahr* and obtain its possession, in order to put a end to his debt to her.[37]

Remedy for non-payment

There is no legislative enactment in India authorizing the Court to dissolve a marriage (on the initiative of the wife) on the grounds of non-payment of *mahr* or of that part of it which is 'prompt'. Nor have the courts assumed such a power on their own. The only remedy available in the courts is to seek a decree for the

payment of *mahr*. And where a wife has stipulated in the contract for 'delegated' divorce' (*talaq-e-tafwidh*) on the ground of non-payment of 'prompt' *mahr* the stipulation will be enforceable in India.[38]

Liability of the guardian

Where the marriage of a person has been contracted by his marriage-guardian (*wali*) two possible situations can occur, viz., either the *mahr* has been fixed or it is left undetermined. In the latter case the rules relating to *mahr-al-mithal* will operate. In either case, guardians liability regarding the *mahr* is regulated by the rules stated below:

1) The question of guardian's liability may arise only if the husband had not attained puberty at the time when the *mahr* was agreed upon (this may be a date even after marriage).[39]

2) In Hanafi law the guardian is not personally liable to pay the *mahr*.[40]. He must, however, pay the *mahr* out of the property of the minor, if he has any.[41] In case the guardian (as also any other person) has personally guaranteed the payment of *mahr* he is liable as surety.[42]

3) In Ithna Ashari law, if the minor husband has no means of his own, the guardian who contracted the marriage may be held liable for *mahr*.[43]

Non-payment of *mahr* and restitution of conjugal rights

As discussed above, the wife has a right to refuse cohabitation to the husband if her prompt *mahr* has remained unpaid. However, if the consummation of the marriage has already taken place, according to Imam Abu Hanifa her right survives even after consummation. But the two disciples hold a contrary view.[44] In India the judicial debate on this matter has begun with an *orbiter dicta* from Mahmood, J. in the famous case of *Ab. Kadir*.[45] He has taken the view that after the consummation of marriage the wife cannot refuse conjugal rights to the husband for non-payment of prompt *mahr*, that is, the view of the disciples has been followed in that case.[46] The same view has later prevailed in the Indian Courts[47] excepting Oudh: probably because of the impact of Oudh Laws Act, 1976.[48]

The matter has come for full consideration before Allahabad High Court in *Anis Begum*.[49] In this case Sir Shah Mahmammad Sulaiman C. J. has discussed it at length. In his observations he clearly seems to be inclined towards the view of Imam Abu Hanifa in principle as an absolute rule of justice but chooses to adopt in the Indian context the view of the two disciples for the following reasons:

> That owing to the prevalent practice, the amounts of *mahr* fixed in this country are often unduly high and beyond the means of the husband. To allow to the wife the right of refusing to live with her husband, even after consummation, so long as any part of the prompt *mahr* remains unpaid would, in many cases, where the husband and wife quarrel, amount to an absolute option to the wife to refuse to live with her husband and yet demand a maintenance allowance. This would dislocate domestic life.[50]

The Court has, however, been conscious about the adverse effects of this rule on the women's right to *mahr* which by this policy could almost get reduced to a nullity. So the court has carved out an exception to the rule for the protection of innocent women in appropriate cases in the following words:

> Under the Anglo-Islamic law as administered in this country a suit for restitution of conjugal rights, though brought for the enforcement of a right under Muslim law, is in the nature of a suit for specific performance and there is accordingly a certain amount of discretion in the courts of justice which can impose a condition of previous payment of the *mahr* debt, or, at any rate, a portion of it, in the decree.[51]

Sir Shah Sulaiman C.J. asserted his discretionary power to decide the present case in the following words:

> Just as we respect the observation made as regards the loss of the right of the wife on consummation, even though it be an *obiter dictum* made in *Abdul Kadir's* case , the 'courts of justice in India, in the exercise of their mixed jurisdiction as Courts of equity and law, are at full liberty to pass conditional decrees to suit the exigencies of each particular case.[52]

He re-stated the rule under discussion as follows:

> There is no absolute right in a husband to claim restitution of conjugal rights against his wife unconditionally; the Courts have a discretion to make the decree conditional on the payment of unpaid *mahr* debt or to impose other suitable conditions considered just, fair and necessary in the circumstances of each case.[53]

In the present case the reasons for imposing the conditions of previous payment of *mahr* on the decree of restitution of conjugal rights have been summed up by Sulaiman C.J. as follows:

1) There are original texts of unquestionable authority where such a condition has been directed.[54]

2) The amount of the *mahr* debt is not excessive and there is no suggestion that it is in any way beyond the means of the plaintiff (husband).

3) The present plaintiff (husband) had contested the defendant's (wife's) claim for *mahr* and in spite of this contest the defendant obtained a decree which has now become final.

4) The present suit was instituted after the institution of the suit for *mahr* and if the defendant is compelled to go to live in the plaintiff's house she may find it very difficult to realize her decree for *mahr*.

5) The plaintiff had remained quite and did not sue for restitution of conjugal rights till the claim for *mahr* had been made in courts and there is ground for apprehending that the suit is by way of nullifying the decree for *mahr*. As a matter of fact, the decree for *mahr* was attached by the plaintiff in execution of his decree for restitution of conjugal rights when the defendant refused to obey the decree.

6) The conduct of the plaintiff as disclosed by the finding on the next point makes it fair and just that he should be called upon to pay the *mahr* debt before he has possession of his wife.[55]

It may be noted here that the 'courts should not exercise their discretion in complete supersession of the Muslim Law, but in exercise of their discretion they should refer to that law'[56]

Once again it may be pointed out with emphasis that though Sulaiman, C.J. has not chosen to disagree with Mahmood, J. in *Ab. Kadir*[57] but his judgement in the present matter, ultimately leads to the opinion of Imam Abu Hanifa rather than that of the disciples and that is closer to the Islamic spirit.

The same question was argued before the Lahore High Court in Pakistan in *Rahim Jan*[58] in which the wife petitioned for divorce on the ground that the husband had failed to maintain her without reasonable cause for two years. The husband defended the petition arguing that the wife had not given him "the benefit of her conjugal society", thus he was under no obligation to maintain her. In reply the wife said that the prompt *mahr* has not been paid to her. The court had to decide whether in Hanafi law, the wife is entitled, even after consummation, to refuse to live with her husband when the prompt *mahr* has not been paid to her. The Court ruled through Kaikus, J. as follows:

> In my opinion when there is a difference in approach between Abu Hanifa and the two Disciples,. regard should be taken of the authority and reason in support of each view. The approach which has the stronger support should then be followed...[59]

It was further said that:

> I do not find any principle of justice or reason by which the right of the wife to refuse the performance of marital obligations on account of non-payment of prompt *mahr* may come to an end by her once surrendering herself. I would hold that even after consummation the wife retains the right to refuse the performance of marital obligations till the prompt *mahr* is paid.[60]

To the same effect are the cases of *Nur-ud-Din Ahmad* and *Muhammadi Begum*[62] from Dacca and Karachi respectively.

5. Indian Usage

As regards the time for payment of *mahr* in India, the general practices, besides what is evident from the case law given above, can be summed up as mentioned below:

Either the whole *mahr* is 'deferred' (*ghayr-mu'ajjal*) or half of it is 'prompt' (*mu'ajjal*) and the other half 'deferred' (*ghayr-mu'ajjal*). In most cases no part of *mahr*, whether 'prompt' or deferred is claimed during the subsistence or marriage; but if a divorce takes place the whole of the *mahr* is claimed.

"When the wife survives the husband and a division of his estate takes place among his heirs (other than sons and daughters) she generally claims the *mahr*". Quite often the wife forgoes the *mahr* especially when she predeceases the husband". In the case of a conflict between any of the aforesaid usages and the legal principles, obviously, the latter will be enforced.[63]

6. Practices in Kashmir Valley

i) Among *Zamindars* and the gentry, generally the practice has been that no part of the *mahr* is made prompt.

ii) Among *Gujjars* the whole of *mahr*, whatever it may be, is paid at the time of marriage. The *mahr* is usually received by the relatives of the bride and probably never given to her later. It may be noted that no written *nikahnama* or *kabinnama* is usually executed or maintained by *Gujjars*.

iii) Among other people the practice has been that the *mahr* is divided into two parts prompt and deferred. There is no specific usage as to how much of *mahr* is a prompt and how much deferred. But the trend has been that the prompt *mahr* is two or three times less than the deferred *mahr*. The emerging trend, as already said, is that among a good number of people, *mahr* is being discharged at the time of the *nikah* ceremony. This trend is not specific to any occupational or a social group but is found among people with developing Islamic literacy with no consideration to their family practices. Customs and usages are losing their grip.

iv) Women themselves, it is still true, are passive about the realization of their *mahr*. However, in case of breakdown of marriage they show interest in *mahr*, of course, at the behest of their parents or relatives.

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3. *The Quran* II: 236.
4. *The Quran* II: 237; See below next chapter.
5. Tahir Mahmood, *The Muslim Law of India* PP. 74-75.
6. Ameer Ali, *Mahommedan Law* Vol. II. P. 442 *(Jama-ush-shittat)*.
7. *Infra* note 24 at P. 448, *Fatawa-i-Qazi Khan* Vol. I, P. 426; See Supra note 6 at P. 443.
8. *Radd-al-Muhtar*, Vol. II: Supra note 6 at p. 443.
9. Supra note 6 at p. 447.
10. *Id.* at PP. 447-448.
11. *Id.* at p. 448.
12. *Ibid.*
13. *Id* at P. 455, *Hedaya*, Vol. 1,P. 54.
14. *Id.* at P. 458.
15. *Ibid.*
16. *Id.* at P. 456. *Durr al-Mukhtar*, P. 208.
17. *Ibid. Jihalat-i-Fahisha* are the words used, which imply an uncertain contingency such as making payment dependent on the happening of an uncertain event. In sucn a case *mahr* becomes immediately payable.
18. Supra note 16.
19. *Id.* at P. 458; *Vikaya ur-Rawaeh* (of which *Sharah-i-Wikaya* is a commentary) gives the same view. *Kanz al-Dakaik* is also agreeing to the same view.
20. Supra note 6, PP 456-58 *(Text of Fatawa-i-Alamgiri)*
21. Ib. at P.448.
22. *Ibid.*
23. Exchange of property for *mahr* is called *Bai-Mukasa*.
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25. *Id.* at 442.
26. Supra note 24.
27. Supra note 6.
28. *Id* at P. 449; *Sharayah*, P. 295.
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36. *Nasiruddin Shah* V. *Amatul Mughani* AIR 1948 Lah.135 (F.B.).
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38. Supra note 5, P. 79.
39. *Id* at PP 75-76; *Mazhar* V. *Abdul*, AIR 1925 Cal. 332.
40. *Mohammad Sidiq* V. *Shahabuddin*, AIR 1927 All 364.,
41. Supra note 37.
42. *Mt. Fatima Bibi* V. *Lal Din*, AIR 1937 Lah. 345.
43. *Sabir Hussain* V. *Farzand Hasan*, AIR 1938 PC 80; (1937) 65 I.A. 119.
44. Discussed above in this chapter.
45. *Ab. Kadir* V. *Salima* (1886) ILR 8 All 149. The view of Imam Abu Hanifa had been followed by Allahabad High Court twice earlier in *Abdool Shukoar* V. *Raheem-on-Nisa* H.C.R. N.U.P. 1874 P. 94 and *Wilayat Hussain* V. *Allah Rakhi* (1880) 11 All. 831. These cases seem to have been ever ignored.
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58. *Rahim Jan* V. *Muhammad* 1955 PLD Lah. 122.
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Chapter - V

CASES IN WHICH MAHR IS NOT PAYABLE

1. Relevant Quranic Provisions

> "..... if ye divorce women before consummation or the fixation of their *mahr*; bestow on them, (a suitable gift); the wealthy according to his means and the poor according to his means; – A gift of a reasonable amount is due from those who are righteous."[1]
>
> And if ye divorce them before consummation but after the fixation of *mahr* for them, then half of the *mahr* (is due to them), unless they remit it or the (man's half)is remitted by him in whose hands is the marriage tie; and the remission (by the husband) is the nearest to righteousness; and do not forget liberality (*fazl*) between yourselves; for Allah sees well all *that ye do*."[2]

In these two consecutive Quranic Verses two situations have been contemplated. One, where a woman, has been divorced before the consummation of marriage and the fixation of *mahr*. Second, where a woman has been divorced before the consummation of marriage but after the fixation of *mahr*. In the former case no *mahr* is payable to the wife but a 'gift' or 'present' called mata[4] in Quranic terms is due to her from the ex-husband. In the latter case the wife is entitled to half of the *mahr* that was fixed. But the Quran permits that the wife may remit the payable half of *mahr* also or the husband may pay, instead of half the whole of *the mahr* and it has been said to be nearest to righteousness. The Quran lays stress on mutual kindness between the separating spouses. This is a high moral principle and its observance is possible only when the separation has taken place on reasonable grounds. This moral principle is enshrined in the Quran to direct the righteous people not to go for divorce; if you resort to divorce on the basis of a just reason then separate with kindness and not with hatred and dislike. The mood with which and the mode by which *mahr* is given by the husband and received by the wife show the state of their

mind and how much kindness they have for each other. It is about this kindness that Allah, in the above given verses says that:

> "For Allah sees well all that ye do"

However, the legal inference remains that when an unconsummated marriage is dissolved after the fixation of *mahr*, half of *the mahr* is payable; and when it is dissolved before the fixation of *mahr*, no *mahr* is payable but only *mata'* is due to the divorced wife. *Ibn Kathir*[4], quoting various classical authorities, has given a list of items which can constitute mata'. These items are as follows:

i) a servant;[4]
ii) some quantity of silver;[5]
iii) three pieces of cloth (at least);[6]
iv) *a kurta, dupatta, quilt* and *chadder*;[7]
v) five hundred *dirhams*,[8]
vi) a servant, some provisions or cloth;[9]
vii) ten thousand dirhams;[10]
viii) half of proper *mahr*;[11]
ix) clothing with which one can offer *nimaz*;[12]
x) thirty *dirhams*;[13]
xi) any minimum or maximum amount which can be given as *mahr*.[14]

None of these precedents is binding in itself. These provide a guidance for the *qadi* to determine mata" to be given in a particular case, which must be reasonable. It is some times called as *mahr-e-mata* and Imam Abu Hanifa says that its value should not exceed half of *mahr*.[15] Imam Shafi'i and Imam Ahmad Ibn Hanbal, ultimately leave the determination of what can constitute *mata'* in a particular case to be decided by the *Hakam* of the Muslim society but it must not exceed thirty *dirhams* (not exceeding the cost of 7½ *tolas* or 75 grammes of silver)[16]. The limits, in our opinion, can change with change in circumstances, as in case of *mahr*. It may be mentioned in this respect that while fixing mata' the Quranic standard given in the following words must be maintained in each and every case; that is:

> "the wealthy according to his means and the poor according to his means — a gift of a reasonable amount is due (to the wife) from those who are righteous.[17]

2. Juristic approaches

a) Unconsummated marriage

Sunni approach

Hanafi doctrine: According to the Hanafi law, the wife becomes entitled to *mahr*, and if any property is contracted to be given in lieu of *mahr*, her right vests therein immediately –

i) on the consummation of marriage;

ii) on a 'valid retirement' which among the Hanafis is considered equivalent to actual consummation; and

iii) on the death of either the husband or the wife before or after consummation.

According to *Fatawa-i-Alamgiri*:

> *Mahr* is confirmed by one of the three things, consummation, valid retirement or the death of either husband or wife, and that whether the amount of *mahr* be specified or it be the *mahr*-al-mithal[18].

A wife, therefore, becomes entitled to the whole of mahr settled on her (specified or proper) when the marriage is consummated by the husband or valid retirement takes place. She may realize only the prompt portion of the *mahr* or she may make an assignment of the whole *mahr*, as a specified debt, against her husband.

Again if the husband were to die either before or after the consummation of the marriage, the wife would acquire absolute right over the whole of her *mahr*; or if she were to predecease him, her heirs would become entitled to *mahr*.

When separation takes place between the husband and the wife either by the *qadi* or by the husband before consummation or 'valid retirement' she is entitled to half of the specified *mahr*. But when no *mahr* has been specified at the time of marriage she is only entitled to *mata'*, the amount of which depends upon local usage – which shall not exceed half of the 'proper *mahr*'.

Even where the amount of the *mahr* has been settled after marriage, wife cannot claim a moiety of such *mahr*, if the separation takes place before consummation, she is entitled to a 'present' only.

However, in any case, the husband can be held to be liable for *mata'* to the wife only if he has himself furnished a cause for separation, that is, he has separated himself from the wife by *talaq* or the like. Accordingly where the cause for separation proceeds from the wife, such as she apostatises, commits adultery, cancels the marriage on the ground of option of puberty or on the grounds of *kufu*, she would have no right to a *mata'*.[19] It may be noted here that some authorities have also mentioned that if the marriage is dissolved by the *qadi* on account of defect in the wife she shall not be entitled even to *mahr* whatsoever.[20]

Maliki and Hanbali opinions about the above mentioned matters are similar to the doctrines of Hanafi law.

Shafi'i doctrine differs from Hanafi doctrine on the following points:-

i) According to Shafi'i doctrine the wife's right to the entirety of the *mahr* vests in her only when the marriage has been consummated, or when either she or her husband had died before consummation and during the subsistence of the marriage. 'Retirement' without consummation does not entitle the wife to the entirety of *mahr*.

ii) Among the Shafi'is a present is incumbent on the husband in every case of separation, whether the cause for separation flows from the husband or from the wife.[21]

Shia doctrine

Like Shafi'i doctrine, under the Shia law also the wife's right to the entirety of the *mahr* vests in her only when the marriage has been consummated, or when either she or her husband dies before consummation and during the subsistence of the marriage. 'Retirement' without consummation does not entitle the wife to the entirety of *mahr*.

In case of separation without consummation the Shias agree in main with the Hanafis. When no settlement of *mahr* has been made prior to marriage, the parties may subsequently come to terms respecting the amount. Such *mahr* is called mahr-*i-tafwidh*. When the amount is settled by arbitrators or by the judge (*Hakim-al-Shara'*), it is called mahr-*i-tahkim*.

The Shias like Hanafis hold the view that if a separation takes place before consummation, the woman is entitled only to half of her specified *mahr* (*mahr-al-mussama*). But they differ from the Hanafis in holding that where a *mahr-i-tafwidh* or *mahr-i-tahkim* has been settled on the wife after marriage, and the husband separates her before consummation she is entitled to the moity of such *mahr*, as in the case of *mahr-i-mussamma*[22]

If the husband and the wife separate before consummation and there is no *mahr* specified in the contract or settled afterwards, among Shias like, Hanafis, the wife is entitled to *mata'*. This is to be regulated by the position and the means of the husband.[23] *Shara'ya* provides that:

> No woman is entitled to *mata'* except one from whom no *mahr* has been settled, and who has become separated from her husband before consummation.[24]

Under the Shia law if a marriage is cancelled before consummation either by the husband or the wife on account of the specified defects in the other, no *mahr* shall be payable to her.[25] This is subject to one exception, namely, when the marriage is cancelled by the wife on account of her husband's impotency then she shall be entitled to get half of her *mahr*.[26] If the marriage is cancelled by either the husband or the wife after its consummation, the wife shall get her full *mahr*.[27]

b) Effect of conduct of woman on *mahr*

When the right to *mahr* has once vested in the woman, according to all the Schools of Muslim Law, it is not defeated or lost by any conduct on her part, that is, woman's right to her *mahr* is not lost by her subsequent apostasy or adultery, but it would be otherwise if the apostasy or misconduct occurred before the right vested in her. In such

a case, the entire *mahr* would fall to the ground. The right once vested is not lost, even if the woman were to murder her husband. Should she commit suicide or be killed by her husband, her right would pass to her heirs.[28]

c) *Batil* and *fasid* marriage

A void (batil) marriage is an unlawful connection which produces no mutual rights and obligations between the parties. There is no right or *mahr*, unless there has been consummation.[24] In case of an irregular (fasid) marriage, that is, a marriage during *iddat*, a marriage in violation of rule about number of wives, a marriage without witnesses, or a marriage against rule regarding unlawful conjunction, no *mahr* is payable if the marriage has been dissolved by the judge before consummation. Such a woman cannot claim even half of *mahr*. However, if before the court has separated the parties to a *fasid* marriage the consummation had taken place then the man will have to pay *mahr* to the woman and the woman will have to observe *iddat*.[30] But in an irregular marriage "valid retirement" is not equated with actual consummation for the purpose of *mahr*.[31] So in this case actual consummation must have taken place. If in an irregular (*fasid*) marriage actual consummation has taken place the wife will be entitled to 'specified' or' proper' *mahr* whichever is less.[32]

The liability to pay *mahr* in case of a consummated *fasid* marriage is subject to a condition that such marriage had taken place due to ignorance or confusion or doubt. If such a marriage was contracted deliberately then no *mahr* is payable in such a case, though *iddat* will still be binding to avoid promiscuity in parentage.[33]

d) *Mahr* and *Irtidad* (apostasy)

If a marriage has been consummated or if under the Hanafi, Maliki and Hanbali laws there has been a 'valid retirement', the wife shall be entitled to her whole *mahr* irrespective of the fact whether it is the husband or the wife who has left the fold of Islam.[34] If the marriage has not been consummated or under the Hanafi, Maliki and Hanbali laws there has not been a 'valid retirement' the wife shall get half the *mahr* if it is the husband who has renounced Islam but she shall not be entitled to get any *mahr* if it is she herself who has renounced the faith.[35]

e) *Muta*[36] and *mahr*

The *mahr* is a necessary condition of such a union. If it is not specified the agreement is void. Where the marriage is consummated, the wife is entitled to the whole amount; if not to half of the *mahr*. In case the wife leaves the husband before the expiry of the term, the husband is entitled to deduct a proportionate part of the *mahr*.[37]

f) *Mahr* and *khaiyar al-bulugh* (option of puberty)

When a separation takes place, by the exercise of the 'option of puberty' and the marriage has not been consummated the wife has no title to *mahr*. But if the marriage had been consummated, she is entitled to her full *mahr* irrespective of the fact whether the separation has taken place by her own option or by the option of her husband.[38]

g) Additions made in *mahr*, if payable

When a separation taken place before consummation, the wife is not entitled to the benefit of any post-nuptial settlement or addition to *mahr* after marriage'.

Among the Shafi'is addition in *mahr* is regarded as a gift and as under the Muslim law no gift is valid without seisin, any addition made by the husband to the *mahr* requires that delivery thereof should be made at that time to the wife.

Among the Hanafis and the Shias, the addition is not regarded in the light of a gift or *hiba*, and does not, therefore, require delivery of seisin, at the time the addition is made, to render it valid.[39]

h) Miscellaneous cases

Ameer Ali has enumerated some situations in which a woman is not entitled to any *mahr* provided the separation takes place before consummation. These are as follows:

i) Where the two minors contract themselves in marriage without the consent of the guardians, and the marriage is cancelled at the instance of the latter.

ii) When a marriage contracted for minors is cancelled by them in exercise of their right of option'.

iii) When the marriage is cancelled by order of a judge, for any cause which gives a 'right of option to the parties'.

iv) When a man enters into a contract of marriage whilst labouring under an illness which comes within the meaning of death illness, and dies from that illness before consummating the marriage.

v) If the wife was suffering from some illness at the time of marriage which prevented consummation and eventually caused her death, her right to the *mahr* would be transmitted to her heirs.

vi) but where a marriage is contracted by concealment from the husband or, if he be a minor, from his guardian, of the fact of the wife's illness, there would be no right to *mahr*, it is only where the man who contracts the marriage is aware that the woman is suffering from an illness which not only prevents cohabitation but also leads to death that he is liable to *mahr* to the woman's heirs. Where, however, these facts are deliberately concealed from him the element of fraud comes in and he is freed from the liability. If a father were to contract his minor son in marriage for a certain *mahr* and the son where to die without leaving any property, the father would be liable to the wife for such *mahr*.[40]

3. Contemporary Trends in India and Abroad

a) Legislations in Muslim Countries

The Ottoman law of Family Rights 1917 contains the following provisions about the payment of *mahr* in the cases of *batil* and *fasid* marriages:

> Where separation takes place after consummation of a marriage which is irregular and the 'mahr' has been specified, such *mahr* or the proper *mahr* whichever is less shall be payable; where in such a case *mahr* had not been specified or had been incorrectly specified, the proper *mahr* shall be binding, if separation takes place before such a marriage is consummated, nothing shall be payable as mahr.[41]

The Egyptian enactments on Family laws (1920-29) are silent about this matter. Same is the position under Sudanese circulars (1932-1960).

The Jordanian Code of Personal Status, 1976, provides as follows:

> Where divorce takes place before *mahr* is stipulated or before consummation of marriage or presumptive consummation, *mata'* will be obligatory and '*mata*' will be fixed up in accordance with custom and usage and in conformity with the husband's position but shall not exceed half of proper *mahr*.[42]

Article 51' of the Syrian Law of Personal Statues, 1953 provides regarding the subject as follows:

> 51(1) An irregular marriage, if not consummated, shall be like a void marriage;
> (2) if it is consummated it shall give rise to the following:
>
> a) the proper or specified *mahr* ,whichever is less.

These provisions are an adoption of the principles of Hanafi law to the extent these are applicable in such cases.[43]

The Tunisian Code of Personal Status, 1958 contains following provisions about the effect of consummation on payment of *mahr*. Section 13 of the code provides:-

> The Husband cannot, unless he pays the *mahr* force the wife to consummate the marriage. After a marriage is consummated *mahr* shall constitute an unsecured debt of which only the wife can claim payment.

Article 26 of the Moroccan Code of Personal Status, 1958 provides that:

> Where there is a dispute between the spouses as to the payment of *mahr*, the wife's claim shall be accepted if the dispute arises before consummation of marriage. But if it arises after that, the husband's statement shall be accepted.

Iraqi law of Personal Status, 1959 simply incorporates the Hanafi Law on the subject:

Art.21. The wife is entitled to the whole of the specified *mahr* after the marriage is consummated or after either spouse has died., In case of divorce before consummation half of the *mahr* is payable.

Art.22. where separation takes place after consummation of an invalid marriage, the specified *mahr* or the proper *mahr* whichever is less, shall be binding; where no mahr has been specified in such a case, the proper *mahr* shall be payable.

b) Indian cases

In India the statutory law related to *mahr* is silent as to the effect of consummation of marriage on *mahr*. The matter has come for consideration before Madras High Court in Tajbi[44] where the husband divorced his wife before consummation. The wife claimed payment of full *mahr*. The Court held that when the husband divorced his wife before the consummation of marriage, the *mahr* which he was supposed to pay to the wife gets reduced by one half. It was contended on behalf of the plaintiff in this case that in as much as the *mahr* in this case was prompt and not deferred, she was entitled to the full amount as soon as the marriage contract was completed irrespective of the consummation of the marriage. But this contention was struck down by the Court as being contrary to the direct authority.

4. **Relinquishment of *mahr* (part or full)**

a) Permissibility of relinquishment

Quran hints at permissibility of relinquishment of *mahr* in part or full in the following terms:

".... if they (wives) of their good pleasure remit any part of it (*mahr*)"[45]

".... if, after *mahr* is prescribed, ye agree mutually (to vary it)."[46]

"Unless they (women) remit it (*mahr*) or is remitted by him in whose hands is the marriage tie."[47]

"And the remission is nearest to righteousness and do not forget liberality (*fazl*) between yourselves, for Allah sees all that ye do."[48]

The relinquishment to be valid must have taken place willingly. If the wife has remitted her *mahr* to the husband but later she demands it again, the husband will be bound to pay *mahr*.[49]

The judicial precedent in India is to the effect that if the wife surrenders her right to *mahr*, it is enforceable.[50] But if the marriage contract contains a stipulation to the contrary the surrender will not be valid.[51] The *sine-qua-non* for the validity of the surrender of *mahr* is that the wife must have worked with free consent, if she has acted under duress etc., the relinquishment will not be valid.[52]

b) Competence to surrender *mahr*

The question that at which age can a wife validly surrender her right to *mahr* has given rise to conflicting views from the Indian Courts. The High Court of Allahabad[53] has taken the view that she must have attained puberty (*bulugh*) under Muslim law. The High Courts of Madras[54] and Patna[55] have insisted that she must then be a major under the Majority Act,. 1875.

The former view is generally accepted as the correct view because the application of the Majority Act, 1875 is unequivocally excluded from matters related to *mahr*. Section 3 of the Majority Act clarifies that the capacity of any person to act in certain matters, which are: marriage, divorce and adoption as well as the religion and religious usages of any class of citizens", shall remain unaffected by its provisions. This shows that the age of majority prescribed by the Act of 1875 is surely meant to determine the capacity to act in all matters other than those specifically exempted by it. *Mahr* has been specially exempted by it. This has been aptly explained in a case decided by a Division Bench of the Madras High Court[56] that:applied to Muslim law this provision should mean that—

i) the Majority Act cannot interfere with the rules relating to minority (*Sighar*) under the substantive Muslim law relating to marriage, *mahr* and divorce — and so in those areas of Muslim law 'majority' still means puberty (*bulugh*); but

ii) in regard to other aspects governed by Muslim law e.g. gifts, succession, wills, pre-emption etc., the capacity to act (under Muslim law) is not protected by the Majority Act against its own provisions and, therefore, in these areas of Muslim law "majority" now means majority satisfying the requirements of the statutory provisions laid down in the Act.

c) Capability to sue under Indian Law and Judicial precedent

Till recently the Civil Procedure Code, 1908 did not specify what is meant by 'minor'. An important question, therefore, before the Courts, was : when a boy or a girl who was major at Muslim Law (i.e. had attained puberty) but was below the majority age prescribed by the Majority Act, instituted a suit in which the Muslim law formed the rule of decision, whether the aforesaid provisions of the Civil Procedure Code applied or not. Judicial opinion was not unanimous on this point and conflicting rulings were given by the Courts. The High Courts of Madras and Patna and the Chief Court of Oudh applied the provisions of the Civil Procedure Code and refused to allow a Muslim, major at Muslim law but minor under the Majority Act, to institute suits relating to marriage, *mahr* etc. without a 'next friend'.[57] The High Courts of Bombay, Calcutta and Allahabad took a contrary view and did not, in similar cases, insist on 'next friend'.[58]

The controversy has now been set at rest. The C.P.C. (Amendment)Act., 1976 has drastically modified order XXXII of the Code. It has included therein a definition of minor according to which in all cases, including those relating to marriage, *mahr*, divorce, adoption, religious rights and usages, the parties to a suit are to be deemed to be minor if they have not reached the statutory age of majority (as laid down) in section 3 of the Majority Act and, will, therefore, need a 'next friend' or a guardian for the suit as the case may be.[59]

5. *Mahr:* Special Cases

a) *Mahr* on Marriage of Slaves

When a man gets his female absolute slave, married to another person, the *mahr* will belong to the owner, i.e. to the first mentioned

person but it is otherwise with a *mokatiba*, who is entitled to receive her own *mahr*. If in the former case the owner should, after the marriage, kill the female slave before consummation, according to Abu Hanifa no *mahr* will be due, while on the other hand, if the slave be killed by another person or die a natural death, the *mahr* will be payable in the usual manner. Imam Abu Yusuf and Iman Muhammad maintain that *mahr* will be due in any case.[60]

If a male absolute slave marries by his owners consent, the *mahr* promised to his wife, being a debt, becomes obligatory on the owner by reason of his consent, and is a debt on the person of the slave who may, therefore, be sold to pay it. On the other hand, a *mokatib* or a *modabhir* (who can not be sold, because, by reason of the contact or promise of freedom, the property in them is inalienable) and must discharge the *mahr* by his own acquisition and his person is not liable to be attached for payment.[61]

If a *mokatib* or *mokatibah* contracts his or her own female slave in marriage without any consent on the part of the owner of such *mokatib* or *mokatibah* the *mahr* is an acquisiton of the seller in like manner as anything else that he or she may acquire.[62]

If a person desires his slave to marry a female slave, and he does so by an invalid marriage and have sexual intercourse; according to Imam Abu Hanifa the slave must be sold for the discharge of the *mahr*, but according to Abu Yusuf and Mohammad this is not so, that the slave may be required to pay the *mahr* on becoming free at any subsequent time.[63] It may be noted that in the case of an invalid marriage, there is no *mahr* unless there is consummation.

If a man contracts his *mazoon* in marriage, the latter being a debtor, the wife, in respect of her proper *mahr* or of a specified *mahr* if less than her proper *mahr* as the case may be, becomes a creditor equally with the other creditors, so that if the slave is sold for the payment of his debt, the price realized must be divided between the wife and the other creditors in proportion to their respective claims, but any amount of specified *mahr* above the proper *mahr* must be postponed till the other creditors have been paid in full.

If a man marries a female slave, without her owner's consent, on a specified *mahr* greater than her proper *mahr*, and her owner

afterwards manumits her,[65] the specified *mahr* goes to the owner or the woman herself, according as the consummation precedes the manumission or is subsequent to it.[66]. It may be pointed out that the *mahr* of a female slave belongs generally, to her owner, and it may perhaps be gathered from this that in the case here proposed, if no *mahr* had been specified, the proper *mahr* would have belonged to the, owner, whether the consummation precedes the manumission or not.

If a man cohabits with the female slave of his son, and she produces a child, and he (the father) claims it, the slave is his *am'walid*,[67] and he is answerable to the son for her value, but not for her *mahr*[68] But on the other hand, if the son gets his female slave married to the father and she produces a child, the father is then answerable for her *mahr* and not for her value; her child is born free and she is not an *am'walid*. The reason of the freedom of the child is that if he were a slave his own brother would be his owner.[69]

b) Infidels, aliens, apostates

In case of conversion to the faith (Islam) of one of the spouses an infidel married couple and the refusal of the other, when called upon to embrace the faith also, if the refusing party be the wife she is entitled (as in the case of her apostasy) to her whole *mahr* if the marriage has been consummatted, but to none if not. It may perhaps be presumed that she is entitled to the whole of the *mahr* if the husband be the refusing party, for nothing is stated to the contrary and her loss of the right in case of her own refusal is attributed to the circumstances that such refusal is her own act.[70]

If a *zimmee* marries a *zimmea*, making the *mahr* consist of wine or pork and one or both should afterwards embrace the faith before the wine has obtained seisin, according to Abu Hanifa the woman is entitled to receive the actual article, if it has been 'identically specified'" but if not, the estimated value of the wine or her proper *mahr* in lieu of the pork, as the case may be., Imam Abu Yusuf, maintains that she is to have her proper *mahr*, and Imam Muhammad the estimated value, in all cases.[71]

In case a Christian *zimmee*[72] marries a Christian *zimmea*, without specifying any *mahr*, or on a specified *mahr* consisting of carrion

(flesh of an animal not lawfully slain), such as may be deemed lawful by members of their profession, and have sexual intercourse with her, or divorce her without consummation, or die without consummation according to Abu Hanifa she is not entitled to any *mahr*, although both parties may have embraced the faith in the interim; but according to Imam Abu Yusuf and Imam Muhammad she will take her proper *mahr* if the husband consummates the marriage or die without consummation and will be entitled to a present (*mata'*) if she be divorced without consummation. All the three lawyers above mentioned agree that the doctrine as to aliens married on similar terms in a foreign country is identical with that held by Abu Hanifa as to Christian *zimmees* and *zimmeas*.[73].

If a husband and wife be both of the Muslim faith and the husband apostatizes, the wife is entitled to her whole *mahr* if the marriage has been consummated and to half if not. But if the wife apostatizes, she is entitled to the whole *mahr* in the former case, but to none in the latter.[74]

6. **Position in Kashmir Valley**

In Kashmir Valley, there are no special customary norms under which the entitlement of a wife to *mahr* is determined. The rules of *Shariah* epply fully in this respect.

Here the void marriages are almost non-existent; the question of *mahr* about such unlawful unions does not arise.

Irregular marriages due to non-observance of *iddat* are sometimes, though very rarely, reported but no serious questions about *mahr* in such marriages have gained importance. Presumably, it is so becuase irregular marriages get regularised on the expirty of *iddat* period and there remains no element of dispute. Under *Shariah* also if an irregular marriage is consummated, the wife becomes entitled to full *mahr*.

Earlier some incidents of 'bride purchase' and 'bride-snatching' locally called as *Udhall* were taking place among tribals and Gujjars of mountainous regions. These, happenings have now been controlled by active Muslim Organisations committed to the task of implementation of *Shariah* in all mater. Those people are now being educated about maintenance of written *nikahnamas*.

Remission of *mahr* by *hiba* is also not uncommon in Kashmir valley. There is a peculiar practice prevalent in Kashmir according to which the wife requests the husband to perform a simple ceremony which is called *mahr bakhshaish*. The husband is requested by the wife to grant to her half of the hearth which implies that she be accepted as a sharer in all property which the husband uses or spends for the pleasure of Allah. This is, in our view, appreciable.

Many people in Kashmir believe that half or one third of the *mahr* gets automatically relinquished after fixation. This is a misunderstanding. The misunderstanding has caught strong roots in certain localities. Even the *Sant Ram Dogra's Code of Tribal customs of Kashmir* (prepared by *Sant Ram Dogra*), the Assistant Settlement Officer of Dogra Maharaja of Kashmir, under his dictates, hereinafter called as Dogra's code) has referred to the situation in Nunar (a place in Northern Kashmir) where one-fourth of *mahr* was deemed as remitted for all brides. For the remaining three fourths ponies and cattle were written as *mahr* in *nikahnama*.

References

1. The Quran II: 236
2. The Quran II: 237.
3. Ibn Kathir, *Tafsir Ibn Kathir*, Vol. I, Chap. II: 236, 237.
4. It is upper limit as per Ibn Abbas (R.A.)
5. *Supra* note 3.
6. As per Ibn Abbas and Hazrat Aisha (R.A.); see Infra note 15.
7. As per Shu'bi(شعبی) it is average standard.
8. As per Sharie (شریح)
9. As per Sereen(سیرین)
10. This amount was given by Hasan Ibn Ali (R.A.)
11. This is the opinion of Imam Abu Hanifa for those cases in which the parties dispute on the matter.,
12. Imam Shafi'is and Imam Hanbali's view'; See Infra note 15; *Al-Meezan al-Kubra-lil Sha'a rani*, Vol. II. P. 117.
13. As per Ibn. Umar; reported by Imam Shafi'i treated as Shafi'i's second opinion
14. Another report from Imam Shafi'i;s - See Infra note 15.
15. Umar Ahmad Usmani, *Fiqh al Quran* Vol. I, P. 512, (Delhi,1984).
16. *Ibid*

17. The Quran II: 236
18. *Fatawai Alamgiri* Vol. I, P. 428
19. Id. at PP. 428, 429.
20. Ibn Qudamah, *Al-Mughni*, Vol. II, P. 654. *Cairo*, 1367 AH); Sharaf al-Din al Maqdisi, *al-Iqna* Vol. III, P. 200 (*Cairo*, n.d.)
21. See generallky Ameer Ali, *Mahommedan Law*, Vol II P. 445.
22. *Ibid*; *jama-ush shittat; Irshad al Allamah*
23. *Ibid*
24. Shara'yah P. 292; See *Supra* note 21.
25. Syed Muhammad Sadiq, *Rawai al Ahkam* P. 277. (*Hyderabad*, 1897) Urdu Trans. of *Sharai-al Islam* by Jaffar B. Hassan)
26. *Ibid*
27. *Ibid*
29. Fyzee, *Outlines of Muhammadan Law*, P. 112 (4th ed.)
30. *Raddal-Muhtar*, Vol. II, PP 573, 574: See *Supra* note 21.
32. Tahir Mahmood, *The Muslim Law of India*, PP 130-131; Ashraf Ali Thanwi, *Bihishti Zewar*, Vol. IV, P. 9 Rule 15.
33. *Supra* note 15 at P. 519
34. Ibn Abidin, *Radd al Muhtar*, Vol. III, P. 402. (*Cairo*, 1349 A.H.)
35. *Ibid*
36. *Temporary marriages are recognised by Ithna Ashari Shias only.*
37. *Supra* note 29 at P. 129.
38. *Al Fatawa al-Hindiya*, Vol. II, P. 10 (Kanpur, 1314 AH)
39. *Supra* note 21 at P. 469.
40. *Ibid*
41. Art. 85
42. Art. 55
43. See above in this chapter.
44. *Tajbi V. Nattar Sharief*, AIR 1940 Mad. 888.
45. The Quran, 4:4
46. The Quran, 4:24.
47. The Quran, 2:237
48. *Ibid*;
49. See *Supra* Chapter "Origin and Development of Law on Mahr".
50. *Jynai Begum* V. Umrao Begum (1908) 38 Bom. 612.
51. *Mt. Khadija Begum V. Nisar Ahmad* AIR 1936 Lah. 887.
52. *Hasnumiya V. Halimunnisa* AIR 1942 Bom. 128: *Nurunnisa V. Khawja Mohammad* (1920) 47 Cal. 537.
53. *Qasim Husein V. Bibi Kaniz Sakina* AIR 1932 All 649.
54. *Abidhunnisa Begum V. Mahammad Fatiuddin Saheb* (1918) 41 Mad. 1026.
55. *Najmunnisa Begum V. Sirajuddin Ahmad* AIR 1939 Pat. 133.
56. AIR 1915 Mad. 815
57. *Abdul Aziz v. pathuma*, AIR 1952 Mad 754; *Najmunnisa Begum V. Sirajjuddin Ahmad* 17 Pat 303; *Usman V. Khatoon* AIR 1942 Oudh 243.

58. *Ahmad V. Bai Fatima* 55 Bom. 160; *Naksetan V. Habiban* AIR 1948 Cal. 66; *Qasim Husain V. Kaniz Fatima* AIR 1932 All 649.
59. Order XXXII of C.P.C. 1908 (as amended in 1976); See *Supra* chapter III.
60. *Hedaya*, II. IV, P. 58 (Grady's Edition)
61. *Ibid*
62. *Ibid*.
63. *Ibid*.
64. *Ibid*
65. See Almaric Rumsey, *Moohummudan Law of Inheritance*, P. 333 (*Lahore*, edition)
66. *Supra* note 60
67. *Am Walid* is a female slave who has borne a child to her master, when the child has been acknowledged or claimed by him, she becomes free on master's death.
68. *Supra* note 65
69. *Supra* note 60
70. *Hedaya*, II. V,. P. 63.
71. *Hedaya*, II, III, Section 2. In case of divorce before consummation, the usual rules are followed.
72. A *zimmee* is an alien infidel who has become a subject of a Muslim Government.
73. *Hedaya*, II,. III, Section 1.
74. *Supra* note 65 and 70.

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Chapter - VI

WIDOWED WOMEN'S CLAIM TO MAHR

1. Law on 'Lien'

a) Survival of the Claim

When the husband predeceases the wife, without satisfying her claim to *mahr*, she does not cease to have her rights on *mahr* because of the husband's death. The claim of the widow to *mahr* survives on the death of the husband and unpaid *mahr* becomes immediately realizable from the estate of the deceased husband. It, however, is not a preferential credit, but a claim like other liabilities of the husband and has priority over legacies bequeathed by the testator and the rights of heirs. A partition of the estate cannot ordinarily take place until the *mahr* has been satisfied. But a partition of the estate before the payment of *mahr* does not invalidate the partition, the heirs take the shares subject to the right of the widow for her *mahr*. Her claim to mahr survives in addition to her rights on the husband's estate as a heir under the law of inheritance.

In the absence of any specific agreement widow is not entitled to any charge on the husband's property. The only right which a widow enjoys in preference to the other creditors of the husband is that if she is in lawful and peaceful possession of the deceased husband's property her possession cannot be disturbed in any way until she realizes her *mahr*. This is called "widow's right of retention" and sometimes referred to as 'lien'. It is only a right to retain possession and not a right to obtain possession.

b) Basic principles of law on 'lien'

The basic principles which govern the widow's right of retention are summed up below:

i) the widow must have obtained the possession of the husband's property on which the right of retention is claimed in a 'lawful' and 'peaceful' manner.

ii) the right is to retain the already obtained possession and not to obtain possession.

iii) the right is only the right to possess and not the ownership over the property under possession.

iv) the right is available against every claim of unpaid *mahr* whether *mahr al-mithal* or *mahr al-musamma*.

v) this right is primarily over the estate of the husband and not against the heirs of the husband. They only get affected by the exercise of this right till the *mahr* is satisfied.

vi) the widow cannot alienate the property in her possession, but as regards the transfer of her mere right of retention, there exists no unanimous opinion on the point.

vii) her claim to *mahr* remaining unsatisfied, if the widow in possession dies, difference of opinion exists whether her special right of retention will pass on to the heirs or not.

2. Judicial Precedents

Right to retain and not to obtain possession

The widow's right of retention is basically a right to retain possession and not a right to obtain possession. If the wife has already obtained the possession of her husband's property, she can continue to hold it till her claim to unpaid *mahr* is satisfied. In *Tahirunnisa*[1] it has been laid down that in case the widow is not already in possession, though her claim to *mahr* stands, she has not a specific right to obtain possession and satisfy her *mahr* claim.

'Lien' and unascertained *mahr*

In *Ahmad Hussain*[2] the right of retention has been held to arise in the cases of 'stipulated' *mahr* as well as 'proper' *mahr*, yet to be

determined. So even where the *mahr* is unascertained, but the widow is in possession of her deceased husband's estate in satisfaction of the *mahr*, she has a lien over it as long as any portion of the *mahr* remains unsatisfied.

Right to retain possession without title to property

The right of retention is a right to retain possession of the deceased husband's property without title. It does not confer the ownership of the property upon the widow. In *Abdul Wahab*[3] the Allahabad High Court has explained this matter in the following lines:

> If the mehr debt has not been paid by the husband in his life time or by his heirs after the husband's death, the widow, if she has lawfully and without force or fraud obtained possession of the property of the husband in lieu of her *mahr* is entitled as against the heirs of the husband and as against the creditors of the husband to retain that possession until her *mahr* is satisfied (but) the right to hold possession does not give the widow any title to the property[4]

Creation of special charge on husband's property

In *Ameerunnisa*[5], the Court at Agra upheld the husband's ability to create a charge on his property in favour of the wife on account of her unpaid *mahr*. The husband, in this case, had charged his estate with *mahr* payable to his wife on demand through a deed of *mahr* in the following words:

> I acknowledge myself justly a debtor for the mahr of my said wedded wife to the amount of Rs. 46,000 of the present currency, the moiety whereof is Rs. 23,000 and the amount I acknowledge to be justly due, and when demanded by my said wedded wife, in the payment thereof, I will raise no objection, no excuse make, but will deliver the same to my said wedded wife.[6]

The *mahr* was not demanded by the wife during her husband's life time but on his death she took possessions of his estate in satisfaction of her claim. Observing that the demand during the life time of the husband was not necessary, the judicial committee affirmed the decision of the Sudder Dewwanny Adawlat at Agra that:

> The widow had a lien upon her deceased husband's estate as being hypothecated for her *mahr* and could either retain property to the amount of her *mahr* or alienate part of her estate in satisfaction of her claim... yet the heir at law would be entitled to the residue after satisfying the widow's claim.[7]

But in *Mt. Ahmadi Begum*[8] where no such deed was in existence, it has been propounded that:

> The claim for *mahr* is a simple money claim and though decree may be executed against the husband's property, it cannot be charged against any specific portion thereof.[9]

In this case a decree had been passed by the Court in favour of the daughter of a widow for Rs. 500 as her share of her mother's *mahr* saying that:

> The plaintiff be and is hereby given a decree for Rs. 500 only by sale of the immovable property in suit."

Some defendants paid her the decretal amount with costs. They claimed from the other defendant the contribution in proportion to the property in his possession, who refused it saying that as per the decree the said amount was to be realized by the sale of the immovable property in the suit. The court rejected his contentions saying:

> It is no doubt stated in the decree that the amount will be realized by sale of the immovable properties in suit, but it is clear that the *mahr* does not create a charge on the propertise and the order for sale of the properties.... It only indicates the mode of execution and does not create a charge.[10]

Thus a court in the absence of an agreement or deed cannot create a charge on the property of the husband in favour of the wife. If any court does it, it is interesting to note, that the appellate court may cancel the charge without cancelling the decree.[11] But if no appeal is preferred and the lower courts decree becomes final, the charge may as such be given effect as was held by Privy Council in *Saiyed Qasim*[12]. In this case a widow after husband's death sued to enforce her *mahr* claim. She contended that alienations made by her husband purported in effect to denude himself of his immovable properties in

his lifetime were invalid and that she was entitled to recover her *mahr* from the properties so alienated. A specific issue was raised at the hearing as to whether *mahr* could be realized from the properties mentioned in the plaint. In reply to this the sub-ordinate judge decreed the suit with costs and interest at the rate of six per cent per annum from the date of judgment upto the date of realization declaring the properties in the plaint to be treated as the properties of the widow's deceased husband from which she was entitled to recover the decrectal money. In appeal the question was raised as to whether on proper construction of the decree the *mahr* was charged upon the properties or not. The question as to whether the properties in plaint could be treated to be the properties of the deceased husband was not raised. The High Court of Patna went against the subordinate judge saying that:

> A widow claiming mahr from her deceased husband's estate is in no better position than any ordinary creditor, and that apart from the decree, a bonafide purchaser for value from the heir would get an unassailable title.[13]

The Privy Council, however, disagreeing with the High Court upheld the verdict of the subordinate judge in the following words:

> "The plaintiff in the suit was not seeking merely to be put in a position to execute a money decree against the estate, but was asking the court by its decree to imprint upon the properties a specific liability to satisfy the *mahr* debt, or in other words to charge the properties with the payment of this particular debt ....., therefore, ... the decree created a charge upon the properties and that the (buyers) having bought with notice of the decree their purchase was subject to the charge.[14]

Moreover, it was made clear that:

> Whether the charge was rightly decreed or not in the first instance is immaterial, though their lordships see no reason to doubt that it was within the competence of the court to make such a declaration. But the decree was not appealed against, and is clearly binding on the parties and those claiming under them.[15]

It may, however, so happen that a widow may omit to forward her claim for *mahr* and assent to a person taking a legacy she cannot afterwards retract her assent.[16]

Possession initially obtained not on account of *mahr*

According to one opinion the widow can exercise 'right of retention' only if the possession has initially been obtained on account of *mahr*.[17] But in *Muhammad Shoaib Khan*[18] when question came directly for consideration, the Allahabad High Court adopted a different view that though the widow might have taken possession without express assertion that it was in lieu of *mahr*, she could subsequently raise such plea. The question before the Court was that, at the time when the mutation of names was affected in her favour she (the widow) could not profess to enter into possession in lieu of *mahr* and, therefore, she could not be allowed to retain the property on that plea. The Court rejected this plea deriving support from the following lines of an earlier judgment *Mt. Beebee Bachan*:[19]

> The right of a widow is founded on her power as a creditor for her *mahr* to hold the property of her husband, of which she has lawfully and without force or fraud obtained possession, until her debt is satisfied.[20]

The court further referred to other earlier judicial remarks as:

> Where a (Muslim) widow entitled to *mahr* gets quietly and peacefully into possession without fraud, she is entitled to retain possession until her *mahr* debt is paid.[21] The balance of authority is in favour of the view that a widow who from the nature of things on the death of her husband in many instances finds herself in possession of some, if not of the whole, of her husband's estate is entitled to hold that estate against other heirs until her claim to *mahr* is satisfied.[22]

The Court concluded its decision with the following lines:

> (Thus) if the power to retain possession of the estate so long as her *mahr* debt is not satisfied is exercised as a power of a creditor (the widow) is entitled to say that her *mahr* debt must be satisfied before she is dispossessed, provided of course, she did not enter into possession unlawfully or with force or fraud (of which) their is no evidence in this case.[23]

For the enforcement of her right of retention it is, therefore, not necessary for a widow to have acquired possession of the husband's estate on account of *mahr*.

Whether consent of husband or his heirs necessary

As regards the question whether express or implied consent of the husband in his life time or of his heirs after his death should have been obtained by the widow for taking possession of his estate under her right of retention conflicting views have been adopted by the Courts. Generally the Madras[24] and Bombay[25] High Courts have followed the view that there is no need of such consent whileas as the Calcutta[26] and Patna[27] High Courts have held that such consent is necessary. As a matter of fact the latter view has first been taken by Allahabad High Court in *Amanatu-un-Nissa*[28] in the following words:

> If a Muhammadan widow entitled to *mahr* has not obtained possession lawfully, that is, by contract with her husband, by his putting her into possession or by her being allowed, with the consent of the heirs, on his death to take possession in lieu of *mahr* and thus to obtain a lien for her *mahr*, she can obtain that lien by taking possession, adversely to the other heirs of property to the possession of which they, and she in respect of her share in the inheritance, are entitled. It would be otherwise if the heirs consented to her taking possession in order to acquire a lien. In such a case the Muhammadan widow on taking possession would obtain a lien for her *mahr*.[29]

The Allahabad High Court has followed the same view in *Muhammad Karimullah Khan*[30] with an explanation that the burden of proof to show that the widow had obtained possession of the property held in lien without the consent of the husband or the heirs. The court said that:

> When a Muhammadan widow is in possession and has been for some time in undisturbed possession and *mahr* is admitted or proved to be due to her, it lies upon the heir who claims partition without payment of his proportion of *mahr* to prove that the Muslim widow was not let into possession by her husband in lieu of *mahr* or did not obtain possession in lieu of *mahr* after her husband's death with the consent or by the acquiescence of the heirs.[31]

Same view has been followed in some other cases[32] including Sabur Bibi[33] in which the matter was discussed with reference to an orbiter in the decision of the judicial committee in Hamira Bibi[34] which was to the effect that:

> Her (i.e. widow) right, however, is no greater than that of any other unsecured creditor, except that if she lawfully, with the express or implied consent of the husband, or his other heirs, obtains possession of the whole or part of his estate, to satisfy her claim with the rents and issues accruing therefrom, she is entitled to retain such possession until it is satisfied. This is called the widow's lien for *mahr* and this is the only creditor's lien of the Mussulman law which has received recognition in the British Indian Courts and at this Board.[35]

This statement, it was contended on behalf of the widow in Sabur Bibi[36] before Calcutta High Court, was only obiter and the Madras High Court[37] had already held contrary to this dictum of the judicial committee. But the Calcutta High Court gave due importance to the orbiter dictum, and chose to follow that saying:

> [It] is necessary to remember that a case is only an authority for the ratio decidendi. This principle is in constant exercise when dealing with the decisions of the courts wherein each judge gives or may give his individual opinion. It is, however, particularly difficult to apply it to the decision of the judicial committee and every lawyer in India knows that the judicial committee, in giving its reasons, has always a very scrupulous regard to the inconvenience that may be caused by orbiter dicta.[38]

In a separate but concurring judgment Gosh, J. further substantiated the view of the Court in the following words:

> It seems to me that peaceful possession cannot always be said to be lawful possession and the case of *Hamira Bibi* only reiterates the law laid down by the Privy Council and explains the expression 'lawful' by adding the words, with the express or implied consent of the husband or his other heirs." This interpretation we are bound to accept as a correct statement of the law.[39]

Same view has been followed by the Patna High Court in *Muhammad Zobair*.[39a]

Another line of decisions considering the consent of the husband or his heirs not necessary for the exercise of the 'widow's right of retention' has begun with the well known delivery of the High Court of Judicature at Fort William, Bengal in *Mussumat Beebee Bachun*.[40] Here a widow, whose husband had died without issue, having been put in possession of her husband's estate by the collectorate courts as

a co-heir and for her deferred *mahr*, was held to hold lien as a creditor on the estate and entitled to retain possession until her *mahr* was satisfied. The court observed:

> The claim of Mussumat Beebee Bachun to hold the property to satisfy her *mahr* cannot be founded upon an original hypothecation of the estate for her *mahr* — for such a right does not arise by the Muslim law as a consequence of the gifts of *mahr*, nor was there any agreement on the part of the husband to pledge his estate for the *mahr*. But the appellant, having obtained actual and lawful possession of the estates under a claim to hold them as heir for her *mahr*, their lordships are of opinion that she is, entitled to retain that possession until her *mahr* is satisfied, and the respondents cannot recover the possession of their shares unless that satisfaction has taken place.[41]

This view has been expressed more clearly by Burkitt, J. in *Amani Begum*[42] explaining that:

> Where a Muslim widow was in possession of the property of her deceased husband, having obtained such possession lawfully and without force or fraud, and her *mahr* or any part of it was due and unpaid, she was entitled as against the other coheirs of her husband to retain possession of such property until her *mahr* debt was paid and that it was immaterial to such widow's right to retain possession that such possession was obtained originally without the consent of other heirs.[43]

The judge has explicitly remarked that:

> Their possession appears to be perfectly lawful as heiresses of their deceased husband according to the Muslim law, and as creditors of their *mahr*. I can find no authority for the proposition that the widow's possession is unlawful unless she has got such possession with the consent of the other heirs.[44]

Same view was emphasized by a Division Bench, of the Allahabad High Court in *Ali Baksh*.[45] Pointing to the genesis of the right of retention, Richards, J. referring to *Beebee Bachun*[46] observed:

> I think that a perusal of the report of the case *Mt. Beebee Bachun* negatives the assumption that a Muslim widow cannot be 'lawfully in possession' unless by contract with her husband or with the consent of their heirs. I do not understand how such a widow can be said to obtain

a 'lien' by contract. If the widow's right is only by virtue of the contract with her husband or with the other heirs, her right must be limited entirely by the terms of the contract. It is not lien. In my opinion where a Muslim widow entitled to *mahr* gets quietly and peacefully into possession without fraud, she is entitled to retain possession until her *mahr* debt is paid, subject to her liability to account for the profits received.[46]

Another Division Bench of the Allahabad High Court followed the same view in *Ramzan Ali Khan*[47], in following terms:

[T]he force of the authority is in favour of the view that the widow who from the nature of things on the death of her husband in many instances finds herself in possession of some if not of the whole, of her husband's estate is entitled to hold the estate against the other heirs until her claim to *mahr* is satisfied without being asked to show either consent on their part or on that of the deceased husband.[48]

In *Sahebjan Bewa*[49] the Calcutta High Court with due reference to the above decisions, further observed:

It must further be observed that the limitation suggested would practically nullify the rule, for if a widow has got into possession by an agreement with her husband or his heirs, it is inconceivable how any case could come into courts for recovery of possession of the estate from her hands, in other words, to bring the case within the principle adopted by the judicial committee namely the possession of the widow to be maintained by a Court of justice, must be possession lawfully obtained, without force or fraud., it needs not necessarily be possession obtained by an agreement with her husband or with her heirs.[50]

Madras High Court in *Beeju Bee*[51] has distinguished itself by giving the fullest possible treatment to the issue under consideration and has decided to follow the 'no-consent' theory in the matter of widow's right of 'retention'. The Full Bench of the Court supported its contention with following observations:

All the authorities suggest that the Muslim widow's lien for *mahr* on property of which she is in possession arises not by virtue of any agreement with her husband or his heirs but by the provisions of Muslim law relating to the administration of a deceased person's estate. That is why it stands on the same footing as any other creditors lien. If a widow or any other creditor of a deceased Muslim acquired the rights of a pledgee or Pawnee by reasons of being placed in possession of the deceased person's property by the consent of his heirs then she or he would have a preferential right relatively to the rights of other creditors of the deceased. If it is not as a pledge, properly so called, that a widow having **a claim for *mahr* has a lien over property in her possession then there can be no necessasity under the Muslim law that she should have obtained possession with the consent of the heirs**. What is called a widow's lien in this connection is founded on the rule of Muslim law as to the administration of a deceased person's estate, viz., that a creditor who has obtained possession of the property of the deceased debtor should be allowed to continue in possession until the debt is satisfied.[52]

The court continued to explain as follows:

Supposing the estate is insolvent he is not entitled to ask that his debt should be paid in full before the estate is distributed **pro rata** among the other creditors. The right of a widow or any other creditors, similarly situated is no more than this, that the heirs are not entitled to recover the property in their possession until the debt is satisfied, because under the Muslim law the distribution of the estate is postponed till after payment of all debts owing by the deceased including the *mahr* due to the wife.[53]

Taking a note of the essence of the right of retention, the court has made an effort to present a balanced view of the situation in the following words:

The widow's possession will be only recognized if she obtained it lawfully and without force or fraud. If one may say so, I can quite understand such a limitation, for it is against the policy of the law that possession obtained unlawfully or by use of force or fraud should be recognized by the Courts, although the limitation is not laid down in so many words in the text on Muslim law. But to go further and to say that the possession must be taken with the consent of the heirs would be entirely to ignore the principle on which the right of the widow in possession is based.[54]

Abdur Rahim C. J. concluded this argument saying:

A Muslim widow who is lawfully and without force or fraud, in possession of her husband's property is entitled to retain possession of such property against his other heirs until her *mahr* is satisfied even though such possession was not obtained with the consent (express or implied) of or under an agreement with, her husband or his other heirs, and that such property would not be divided among the heirs until the *mahr* debt is satisfied.[55]

The 'no consent' view has influenced the decision-making in many subsequent cases like *Maina Bibi*[56], *Muhammad Shoaib Khan*[57], *Imtiaz Begum*[58] and *Hasnumiya*[59]. In *Imtiyaz Begum*[60] the question involved was the same as to 'whether the widow's right to retain possession of the husband's property in lieu of *mahr* is dependent upon her possession originating with the consent, express or implied, of the husband or the husband's heirs. The High Court of Allahabad contended in favour of the 'no consent' theory as follows:-

> This right of 'retention' is not a lien in the true sense of the term. Her right to retain and continue in possession of the husband's estate in lieu of her *mahr* is a creature of Muslim law and does not in the generality of cases originate from a contract with the husband or with his heirs.[61]

In this respect we may not miss to refer to the following lines of Chagla, C. J. of Bombay High Court in *Mir Vahid Ali*.[62]

> "In our opinion, if it is found that a widow is in possession of the property of her husband, if it is further found that a *mahr* debt is still due to her and she is still claiming that *mahr* debt, then her right to retain the property exists and it is immaterial in what character she came into possession of the property provided she came into possession lawfully and without force or fraud.[63]

On the question under discussion scholars have also differed in their opinions. Some of them have said that since the widow's possession is legally required to be 'peaceful and lawful' consent of the husband or his heirs is an implied feature of such possession.[64] Others feel that the requirement of consent is meaningless in view of the true nature of the widow's right.[65]

Presumption of lawful possession

There is a legal presumption of lawfulness of the acquisition of possession in favour of a widow who has been in possession in her husband's lifetime and continues to do so after his death.[66] In such a case it is not necessary to prove that the widow had taken possession on account of *mahr*.[67]. However, in *Mt. Fahiman* it has been pointed out that this principle cannot be applied where this plea was never raised by the dependents in the trial court and it is doubtful to raise it in second appeal having regard to the fact that it would be necessary to

go into evidence as to the amount of *mahr* and as to whether or not the *mahr* has been paid off by widow's possession of the house nor in a case where it is admitted that the widow has transferred it to another by gift and given possession.[68]

Mere permissive possession

An instance of this is the case of *Mt. Sampatia Bibi*[69]. In this case the plaintiff had purchased a house from the heirs of the deceased and taken into possession also. Then he had allowed the widow of the deceased to live in the house at a later date. The Court held that:

> Where a widow is not in proprietory possession, but merely in permissible occupation of the property of her husband the rule of Muslim law that she has a right to retain the possession until payment of the her *mahr* does not apply.[70]

Property in possession it-self mahr

Where a widow pleads possession of property in lieu of *mahr* since the time of marriage, on satisfactory evidence, as has been held by the Calcutta High Court in *H. M. Mondal*[71], the property itself may be regarded as 'prompt' *mahr*.

Loss of possession and recovery

Where a widow in possession of her deceased husband's estate in lieu of *mahr* is dispossessed she is entitled to recover possession. In an earlier Allahabad decision *Azizullah Khan*[72] the rule *inter alia*, has been summed up in the following words:

> A widow lawfully in possession of her husband's estate occupies a position analoguous to that of a mortgagee and her possession cannot be disturbed until her *mahr* debt has been satisfied and after her death her heirs are entitled to succeed her in such possession, and if wrongly deprived thereof, to maintain a suit for its recovery.[7]

The Court has further strengthened the same view in *Ali Baksh*[74] saying that:

> Where a Muslim widow entitled to *mahr* gets quietly and peacefully into possession without fraud, she is entitled to retain possession until her

mahr debt is paid, subject to her liability to account for the profits received. ... if the widow, being so in possession, dies, her right descends her heirs.[75]

The Allahabad High Court has, however, in one more case, *Mashal Singh*[76] modified its earlier views with following terms:

> The lien of a Muslim widow over property, on account of a *mahr* debt, only operates so long as she remains in possession of the property. On being deprived of possession, she has a right, independently of her lien, to recover possession within six months under the Specific Relief Act. The lien gives her no title, or right to recover possession, but only a right to retain possession.[77]

Ashworth, J. has further observed:

> Nor, apart from section 9 of the Specific Relif Act, can the widow rely on the title arising from mere prior possession.Title based on mere prior possession is only available against someone other than the rightful owner and the widow, only having a right of lien has no title.[78]

Walsh, J. has clearly pointed out in this case that:

> The right to maintain a suit for recovery of possession, if wrongfully deprived thereof, has nothing to do with the right of lien. It is the ordinary right under the Specific Relief Act of a person rightfully in possession to sue on a possessory title for recovery of possession if he has been wrongfully deprived of it, but such a suit must be brought within six months of wrongful dispossession.[79]

About the proposition that 'a widow lawfully in possession of her husband's estate occupies a position analogous to that of a mortgagee, Walsh judge has further observed:

> But a lien is not a right to possession and although the right of lien may be analogous to the right of a mortgagee, the comparison gives no assistance unless you define the mortgage to which the right of lien is analogous and arrive at an agreement as to the essentials of a lien which are coterminous with the essentials of a particular form of mortgage. The mortagee's right to possession is based upon the contract, but the right to a lien is based upon possession. It does not give a right to recover possession if it should be lost.[80]

Whether it is a '*Lien*' in strict sense

The question has directly been referred to in an earlier case *Mussumat Bebee Bachun*[81]. The court in this respect has made the following observations:

> It is not necessary to say, whether this right of the widow in possession is a lien in the strict sense of the term, although no doubt the right is so stated in (various judgments). Whatever the right may be called, it appears to be founded on the power of the widow, as a creditor for the *mahr*, to hold the property of her husband, of which she has lawfully and without force or fraud, obtained possession, until her debt is satisfied, with the liability to account to those entitled to the property, subject to the claim for the profits received.[82]

It seems that widow's right of retention is not strictly speaking, what is lien at common law. We find a hint regarding that in the following lines of the judgment in *Hamira Bibi*[83]:

> Her right, however, is no greater than that of any other unsecured creditor, except that if she lawfully with the express or implied consent of the husband or his heirs obtains possession of the whole or part of his estate to satisfy her claim with the rents and issues accruing therefrom, she is entitled to retain such possession until it is satisfied. This is called the widow's lien for *mahr* and this is the only creditors lien of the Muslim law which has received recognition in the British Indian Courts and at this Board.[84]

Widow's lien, we submit, is a mere possessory lien differentiable from general lien which is available as a security for all debts arising out of similar transactions between the parties. It is not a charging lien also which is the right to charge property in another's possession with the payment of debt or the performance of a duty.

Widow's right whether analogous to mortgage

In *Maina Bibi*[85], *inter alia*, difference has been marked between the right of retention and mortgage, usufructuary or other. A widow being in possession of her husband's estate in lieu of her *mahr*, heirs of the deceased obtained against her a decree that they should have possession of their shares of the estate upon payment of a proportionate part of the *mahr* within six months and that upon

failure to pay their suit should be dismissed. After the six months had elapsed without the payment of being made, the widow made by deed a gift of the estate and parted with possession of it to the donees. Several years after the first decree the same heirs sued to the widow and the donees for possession of their shares. The plaintiffs were held entitled to possession unconditionally, no opinion being expressed as to whether the representatives of the widow could in some other suit recover the unsatisfied portion of her *mahr*. Query was raised as to whether the widow could transfer her *mahr* or her right to retain possession until the *mahr* debt was discharged. The question was dealt with by the Court on the basis of contended analogy between widow's right of retention and mortgage. In this respect the following observations of the Court are notable:

> In the case of a mortgage the mortgagee takes and retains possession under an agreement or arrangement made between him and the mortgagor neither the possession of the property nor the right to retain that possession when acquired is conferred upon the widow by the agreement or the bounty of her deceased husband. The possession of the property being once peaceably and lawfully acquired, the right of the widow to retain it till her *mahr*-debt is paid is conferred upon her by the Muslim law.[86]

> The husband, when he grants *mahr* to his wife cannot, by any original hypothecation of his property, secure to her the payment of it. But the original and intentional hypothecation of the mortgaged property to secure the repayment of the mortgage debt is the very essence of every mortgage, usufructuary or other.[87]

> The widow who holds possession of her husband's property until she has been paid her *mahr* has no estate or interest in the property as has a mortgagee, under an ordinary mortgage.[88]

> The position of a Muslim widow entitled to *mahr*, who enters upon her deceased husband's property lawfully and peaceably and only claims to retain that possession till her *mahr*-debt is satisfied and the position and right of a mortgagee, usufructuary or other, to whom an owner pledges his property to secure the repayment of a debt (is different). There is no real or true analogy between the two ... there is nothing more misleading than a false analogy".[89]

Rights and Obligations of deceased husband's heirs

Any of the heirs can lawfully alienate his or her share in the property of the deceased but the alienation will be subject to the widow's right of retention where she is in law entitled to it.[90] However, if the heirs of the deceased husband other than his widow have taken possession of his property, the widow cannot then displace them.[91] In Hamira Bibi[92] it has been laid down that where the property is in widow's possession each heir can recover his part of property by proportionate discharging of liability. It has been held that:

> Where a widow is in lawful possession of her husband's property and is under law entitled to retain the possession, each of the other heirs of the husband can recover his or her share in it by discharging his or her liability in regard to the *mahr*.

In the same line falls the decision in *Mt. Nawasi Begum*[93] where a Muslim widow was in possession of her husband's estate in lieu of *mahr* and a suit was brought by his nephew for possession of his share which was decreed subject to payment of a certain sum within certain time to her. On his failure to pay anything he was kept out of possession. Subsequently a fresh suit by the daughter of the deceased nephew claiming her share of the property was not held to be barred by *res judicata*. The rule from this decision has been summed up by Prof. Tahir Mahmood as follows:

> Where a conditional decree for recovery of possession of the property from the widow is made (in favour of the husband's heirs suing for the same) subject to the condition that they pay her *mahr* within a specified time else the suit would be dismissed, the dismissal resulting from non fulfilment of the condition will not debar the heirs from claiming the property by a fresh suit or otherwise.[94]

The widow in all cases is liable to render accounts of the property in her possession and of its usufructs, to other heirs of her husband.[95] It may be pointed out that heirs of the husband are not personally liable to pay the unpaid *mahr* of his widow. The liability of each heir is limited to the extent of that portion of the *mahr* which is proportionate to the share he or she gets in the husband's property under the law of inheritance. Widow herself as an heir will also contribute to *mahr* out of her share in the husband's property.[96] So a decree ob-

tained by a non-heir (e.g. a creditor) against the heirs of the deceased husband cannot be executed while the property is lawfully in possession of the widow on account of unpaid *mahr*. However, when the other heirs recover possession from her, the decree against them will be executed.[97]

Rights and Obligations of the widow in possession

As mentioned above that the widow has no title to property in her possession, except to the extent of her own share as a heir. If, however, she is dispossessed while her *mahr* remains unpaid, she can sue for recovery of possession, though she will still have no title to the property.[98]

While in possession she can sue for her *mahr*. In *Ghulam Ali*[99], it was held that while doing so the widow must specifically offer to give up the possession when *mahr* is paid. However, in a later Patna case *Mohitan*[100] it was held that it is not necessary for her to do so. The court, in this case, has struck down the argument that she must bring the entire estate left by her husband into a common 'hotch pot'. Against this view, on the basis of an earlier Calcutta decision *Mohammed Sharafat*[101] a contention was raised as to where a widow is in possession of a portion of the estate and the other heirs have possession of the remainder, she may recover her *mahr* by way of an administrative suit or by a suit against the other heirs, provided she offers to surrender possession of the property in her possession and that, if she adopts the latter alternative, the litigation really assumes the character of an administrative suit. The plaintiff cannot be allowed to retain a portion of the property left by her husband and to sue the defendants for her *mahr*.

The Patna High Court marked a distinction between the *Mohitan* and *Mohammed Sharafat* on the basis that in the latter widow was retaining a portion of the property left by her husband and yet was suing for the entire *mahr* while as in the former the plaintiff had given credit for one-forth of the properties left by her husband and she sued for the balance after giving some remission of the *mahr* debt.[102]

The widow is liable to render accounts of the property in her possession and of its usufructs to other heirs of the husband.[103]

She cannot alienate the property in her possession.[104] Neither a sale[105] or mortgage[106] nor a gift[107] will be allowed. The alienation in each case will be void except to the extent of her own share in the property as an heir.[108]

The mere act of alienation does not make the widow liable to be dispossessed.[109] The view that she loses her right of retention, if she merely attempts to alienate the property in possession seems to be inaccurate.[110] If she, however, puts the alienee in possession, her right of retention comes to an end for all times to come. So when alienation is set aside (for it is void in law), possession will not be restored to her.[111]

Transfer of the right of 'retention' by the widow

In law, regarding unpaid *mahr*, a widow has broadly two distinguishable rights. One is the right to *mahr* itself and the other is the right ro retain possession of her husband's property on account of unpaid *mahr*. Transfer of *mahr* itself cannot be the same as the transfer of the widow of her special rights of retention. So the rules regulating these two transactions cannot be same.

There seems no apparent reason to express a doubt as to a widow's right to transfer her *mahr*. But her right of 'retention' is substantially a different matter. The main issue is as to whether the special right of retention in Muslim law is merely a personal right (*Shakshi haq*) or it is itself a property (*māl*). The judicial opinion on the issue is divided.

The following views have been adopted by the Courts:[112]

i) the right is wholly non-transferable;[113]
ii) it is transferable with the transfer of *mahr* itself, but not as a separate interest;[114]
iii) it can be transferred for the lifetime of the widow[115]
iv) it is transferable by itself, irrespective of whether the *mahr* has been transferred;[116]
v) it is not automatically transferred with the transfer of *mahr*.[117]

Rights of the widow's heirs

If a widolw dies without realizing the *mahr*, it cannot lapse but her heirs will have a lawful claim to it. Now the question whether on

the death of a widow her right of retention which she exercised till her death, will also pass on to her heirs, has invoked conflicting judicial response. In some cases the right of 'retention' has been held to be heritable[118] while as in others it has been declared to be not so.[119]

Where a widow had not during her lifetime, obtained possession of her husband's property on account of unpaid *mahr* her heirs will not have a right to obtain possession of the said property on account of unpaid *mahr*.[120] However, on the death of the widow her own heirs or her legal representatives are entitled to sue for the debt.[121]

3. 'Interest' on *mahr*

This is an established precendent that the widow is liable to render accounts of the deceased husband's property in her possession and of its usufruct to other heirs of the husband.[123] Against this liability the widow is entitled to claim compensation which in India, has on the consideration of equity been allowed in the form of interest on the amount of *mahr* due, from the time of the husband's death. In an early case of 1868, *Woomatool Fatima Begum*[123], we find an instance where the Court has presented the genesis and has upheld the widow's right to a compensatory due, oridinarily called as 'interest' on account of unpaid *mahr*. In the case under discussion the widow had held possession of her husband's estate under a lien for *mahr*. She was dispossessed by a decree of the Court. She then sued one of the heirs for a proportionate amount of her *mahr*. The defendant, among other things, claimed that the plaintiff must account for *mesne profits* during the period she held possession. But she asked that she may not be compelled to account for the profits of the land during the term she held it in lieu of her *mahr*. The court agreeing with the plaintiff widow remarked that:

> It would be inequitable to make her account for the profits, except on the terms of allowing her reasonable interest. The annual rents and profits being less than such reasonable interest., the claim for mesne profits ... disallowed.[124]

The view of the court, at first sight, seems to be as sound as an algebraic equation, but the Calcutta High Court in *Bakreedan*[125] has taken a genuine exception to this view saying that:

> "Where the *mahr* is fixed at a sum very much larger than the value of entire property belonging to the husband, the widow is not entitled to claim interest on *mahr*".

The same Court in *Sahebjan Bewa*[126] without reference to this exception gave an explicit explanation in favour of the widow's right to claim interest on unpaid *mahr* in the following words:

> It may reasonably be assumed for the purposes of this litigation that if the widow had received her *mahr* debt immediately upon the death of her husband, she might have invested it in property which would have brought her approximately the same amount of profit that she has actually realized by possession of the property in dispute. In this view, she would be entitled to remain in possession till the principle amount of her *mahr*-debt was paid to her ... [So] the profits received by the widow may be set -off against the interest on the *mahr*-debt.[127]

The Allahabad High Court in the well known case of ***Hamira Bibi***[128] has shown a stronger inclination towards the widow's right to claim interest' on unpaid *mahr*. Following words of Karamat Hussein, J. are noteworthy:

> It would be extremely inequitable to make a Muslim widow in possession of her husband's property in lieu of her *mahr* liable to account for the profits of the property without giving her a right to claim interest upon her *mahr* ... I would without the least hesitation hold that a Muslim widow in possession of her husband's estate in lieu of her *mahr* could claim interest on it, and that the Courts in British India should not refuse to grant her decree for it on the ground that the Muslim law prohibits usury.[129]

This decision was upheld in appeal by the Privy Council with some clarifications as follows:

> When a widow is allowed to take possession of her husband's estate in order to satisfy her *mahr* debt with the income thereof, it is either on the basis of some definite understanding as to the conditions on which she should hold the property, or on no understanding. If there is an agreement, express or implied, that she should not be entitled to claim any sum in excess of her actual *mahr*, she must abide by its terms. But where there is no such understanding, and a claim is made ... whether, on equitable considerations she should not be allowed some reasonable compensation not only for the labour and responsibility imposed on her

> for the proper preservation and management of the estate, but also for forbearing to insist on her strict legal right to exact payment of her *mahr* on the death of her husband. Their lordships think that she is so entitled, and obviously compensation for forbearance to enforce a money payment is best calculated on the basis of an equitable rate of interest.[130]

Later the Privy Council in **Fakhrunnisa**[131] marked a distinction between interest' on *mahr* and the ordinary interest. In its words the former is only as:

> "a means of preventing her (the widow's) position being adversely prejudiced by unsuccessful controversy raised by appellants (husband's heirs)."

In *Maina Bibi*[132] interest was allowed by the Privy Council at the rate of three percent, but it was not definitely laid down that a widow can in all cases claim interest on her *mahr* as a matter of right. The Allahabad High Court in *Nawasi Begum*[133] has held that the discretion lies with the Court that it may or may not allow 'interest'. The Court said:

> Some discretion is allowed to the Court in determining whether interest should be allowed on 'mahr debt and the disproportion between the value of the property and the *mahr* is a good ground for holding that interest cannot equitably be allowed.[134]

In this case the total value of the deceased husband's property was not more than Rs. 18,000 whereas the *mahr* was Rs. 50,000. No 'interest' was allowed by the Court in this case.

To sum up, the general principle involved in the matter under discussion we find in the following lines of Peshawar decision in *Shankar Das*:[135]

> She (the widow) is entitled to remain in possession until her *mahr* is satisfied. She has, of course, to account for the profits of the house received by her and ... she is entitled to compensation by way of interest.[136]

4. Surrender of *Mahr* by the Wife Before Husband's Death

Where the wife has made a valid surrender of *mahr* or has made a *hiba* of *mahr* in favour of the husband before his death, her claim to

mahr shall not revive after the death of the husband.[137] Also where the wife makes a hiba of *mahr* to the deceased husband after his death it will be valid.[138] However, if the *hiba* of the *mahr*, in any case, was made during the labour pain and then she died, it will not be valid.[139]

Hiba of *mahr* in favour of the heirs of the deceased husband after his death will be valid. If such a *hiba* is made conditional the *hiba* will become valid on the fulfilment of the condition. If the condition remains unfulfilled the *mahr* will return back to the woman.[140]

5. *Mahr* as Property - Will and Inheritance

Mahr is a debt and comes, therefore, under the second head in the order of application of the property of the propositus after funeral expenses but before legacies and distribution under law of inheritance. So whenever the word estate or *māl* is used in the law of inheritance it means estate or property subject to prior charges like *mahr*.[141]. Thus provides Hedaya:

> The right to *mahr* is not extinguished by the death of the husband or wife, or both. Infact, a claim of *mahr* may be maintained by the wife against the husband's inheritors or by the wife's inheritors against the husband, or by the wife's inheritors against the husband's inheritors.[142]

Even the widow's right of retention has been held by some courts as heritable.[143] But it is maintained by Imam Abu Hanifa that there is one exception to this rule, namely that when both the husband and wife are dead, the inheritors of the wife have, generally, no claim for proper *mahr*, so, unless there was a *mahr* specified they have, generally no claim at all.[144] But Imam Abu Yusuf and Imam Muhammad oppose this view. Imam Abu Hanifa has founded his view on the difficulty of ascertaining what is the amount of proper *mahr* by reason of the probable death of equals in age, etc. who if living could have given evidence on the subject. He, however, admits that, if both husband and wife happen to die early, so that their equals in age are likely to be still living, the inheritors may demand the proper *mahr*.[145] The view of the two disciples seems to be prevailing and the whole matter seems to be, in reality, only a question of fact which can be tested by evidence.[146]

Mahr is the absolute property of the wife and descends like any other property that she may possess.[147] It can also be assigned by its

owner, the wife, anytime, after it has vested in her. But when can the assignee realize it that will depend upon the rules regarding the time for payment of *mahr* to the wife herself. In any case there can be no objection to the assignment of the *mahr* by the widow, as the *mahr* fully vests in her the moment her husband dies.[148] Ordinarily, it seems that *mahr* as property vests in the wife at the time of *nikah* irrespective of whether it is specified or not; logically, therefore, after *nikah* the wife should have the right to assign it at any time.[149]

Mahr has been held to be transferable by all the Indian Courts though there exists difference of opinion about the transferability of the widow's right of retention. So *mahr* itself can be good subject of transfer under Muslim law by way of both testamentary disposition and disposition *inter vivos*. *Hiba* of *mahr* is not an uncommon practice in Muslim society, however, the testamentary disposition of *mahr* has been rare. *Mahr* can constitute a valid subject of will (*wasiyat*) and it will be governed by the general rules of Muslim law related to wills.

6. Position in Kashmir

Common practices

When a wife survives her husband, the practice nowadays is that some provision is fixed for her by the heirs of the husband for her maintenance and the property is distributed by them among themselves under some agreement called family property settlement. In some cases a plot of land or other property is reserved for her maintenance reversible to the heirs on her death. Where no such arrangement is possible some other measure is adopted like proportionate contribution by all heirs towards her expenditure. In *Gujjar* and *Bakerwal* tribes a cow or buffalo is reserved for her maintenance.

Usually the widows do not launch a specific claim for unpaid *mahr*. However, in cases of dispute with other heirs they set up their claims of *mahr* along with her other rights in deceased husband's property. These matters are being settled privately with or without the interference of the local respectable persons.

Entries in Dogra's Code

The **Dogra's Code** which is being treated as a source of customary law of Kashmir contains some relevant entries (Question number 24, 49 and 51) regarding the present subject. However, no consistency is found in their contents. These entries are to the following effect:

i) If a widow survives with a daughter (*khananishin*) the whole of the property of the husband will devolve on the daughter. The widow can get only *mahr* on its demand.

ii) If the widow survives with the brothers of the deceased or their descendants, the uncles or their descendent, or great uncles or their descendents, she inherits only life-interest in the estate till remarriage or death and then it goes to deceased husband's agnates. In Anantnag, Sopore and Srinagar *Shariat* is followed in the matter under (i) and (ii). Among Shias of Pattan and Sriprtap Singhpura Tehsil, the 'widows get one-eighth share and *mahr* out of the property of the deceased husband .

iii) Widows without sons get *mahr* or a plot of land for life or till remarriage with no power of alienation.

Among Gujjars of Pattan a sonless widow can get only *mahr*. Among Gujjars of Handwara, Shahr Khas and Sripratapsingpura Tehsil no share of the landed property is given to widows. They are maintained if they live at home, if they go, away they take their *mahr* with them.

People of Srinagar and Khanabal follow *Shariah* in this respect. In town of Sopore if a widow wishes to go out of home, she gets one-eighth of the property of the deceased and her *mahr*. The widow with son has usufrusctuary rights of home; but if remarries, she gets usual *Shara'i share*.

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120. *Zaibunnisa V. Nazim Hasan* AIR (1962) All 197. *Tahirunnisa V. Nawab Hasan* (1914) 36 All 538.
121. *Janudul Haq V. Zubair Haider* AIR 1981 Pat. 345.
122. *Supra* note 100.
123. *Woomatool Fatima Begum V. Meermun Nisa Khatun* (1868) 9 Suth WR 318.
124. *Ibid*; See also *Supra* note 34 at P. 302.
125. *Bakreedan V. Ummatul Fatima* (1906) 3 CLJ 541.
126. *Supra* note 49.
127. *Id.* at P. 481.
128. *Hamira Bibi V. Zubaida Bibi* (1911) 33 All 128.
129. *Id.* at P. 193.
130. *Supra* note 34 at P. 301.
131. *Fakhrunnisa V. Moulvi Izhar* AIR 1921 PC 94.
132. *Supra* note 93.
134. *Id.* at P. 41.
135. *Shankar Das V. Mahbub Jan* AIR 1942. Pesh. 92
136. *Id.* at P. 94.
137. *Fatawai Alamgiri*,Vol. II, Part VI, P. 91 (Deoband, n.d)
138. *Ibid.*
139. *Ibid.*
140. *Ibid.*

141. *Al Sirajiyah* P. 12 [*Alamaric Rumsey's Edition*, (Delhi 1981)]
142. *Hedaya* II: iii: 37, 39.
143. *Supra* note 119.
144. *Alamric Rumsey, Moohumudan Law of Inhertiance*, P. 369. (Lahore, n.d.).
145. *Ibid.*
146. *Supra* note 142 at P. 38,29.
147. *Supra* note 141 at P. 85.
148. See *Supra* note 94 at P. 146.
149. *Ibid.*
150. See above in this chapter.

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Chapter - VII

DIVORCED WOMEN'S CLAIM TO MAHR

If a marriage has broken down irretrievably and the parties to it are no more ready to live together then in such cases the dissolution of marriage becomes indispensable. It is for this reason that Islam recognizes marriage dissolution though discourages it as a matter of its social policy and has declared it as the "worst of all permissible things (*abghad-ul-mubahat*)".

As regards the process of marriage-dissolution, Islam wants the husband and the wife to go for separation privately without harming each other. They may seek any formal judicial intervention only in exceptional cases. In other words, Islam has recognized the extra-judicial pattern of marriage dissolution as a general policy and judicial marriage dissolution only as an exceptional measure demanded by circumstances like fault or guilt of either or both the parties. Both these patterns of marriage dissolution have got institutionalized and have, in practice, acquired different forms.[1] The position of a divorced woman's claim to *mahr* can be determined with reference to the respective form of marriage dissolution followed in a particular case. Below is given an account of the various existing forms of marriage dissolution and the divorced women's entitlement to *mahr* in each case.

1. The Classical Law Related to *Mahr* and Marriage Dissolution

Cases of talaq and talaq-e-tafwidh

Dissolution of marriage taking place under a unilateral action of the husband is called the *talaq* and that under the unilateral action of the wife, who may have reserved in the marriage contract an authority delegated by the husband to pronounce a divorce in the cases specified in the contract, the *talaq-e-tafwidh*. As regards the position of *mahr*

in these cases, unless there is an agreement to the contrary, the wife will be entitled to —

a) in lawful marriages:

   i) if consummated[2] — the whole 'specified' *mahr*'; when *mahr* is unspecified, the 'proper' *mahr*;
   ii) if unconsummated — half of the specified *mahr* if unspecified[3], only *mata'* [4];

b) in irregular marriages (recognized by Hanafi law):

   i) if consummated — 'specified' or 'proper' *mahr* whichever is less;
   ii) if unconsummated — no *mahr*;
   iii) if consummated 'presumptively' only — no *mahr*.

In case of irregular marriages 'valid retirement' is not equated with actual consummation for the purposes of *mahr*.[5]

Cases of *khul'*[6]

Termination of marriage by the husband at the request of the wife is called *khul'*. It literally means 'to put off'. Here the husband lays down his right over his wife at her request when she gives or agrees to give *iwaz* (some consideration) to the husband for her release from the marriage tie. The *Quran* provides:

> Then if you fear that they (the husband and the wife) cannot keep within the limits of Allah, there is no blame on them for what she gives up to become free thereby.[6]

To the same effect is the famous *hadith* when Prophet (S.A.W.) asked Thabit Ibn Qays to release his wife Jamila, daughter of Abdullah B. Ubbay b. Salut, who had requested for that, in return of the orchard which he had given to her as *mahr*.[7]

It is, therefore, open to the spouses to agree to *khul'* on the condition that the wife surrenders or returns her *mahr* to the husband. Hence whatever may in law constitute *mahr* in marriage can also form the *iwaz* in *khul'* and the wife may agree not to claim from the husband her hitherto unpaid *mahr* or any part thereof which she will lose accordingly. It can, however, be made an express condition of *khul'* that the wife's *mahr* or a portion of it shall remain payable by the husband. If the whole *mahr* has already been paid to her, she may agree to make a specified payment to the husband as *iwaz* (which may or may not be regarded as the return of *mahr*). Where an agreement of *khul'* is silent on the question of *iwaz* there is difference of opinion among Hanafis about the husband's liability for payment of *mahr* to the wife. According to Imam Abu Hanifa the husband's liability for *mahr* is discharged, but according to both of his disciples, it is not.[8]

Different opinions exist about husband's liability for payment of wife's *mahr* and wife's liability for its return if it has already been paid to her. Where the spouses settle *iwaz* other than *mahr* and no mention has been made about the *mahr*, the following results will follow:

i) If the marriage has been consummated and the whole *mahr* has been paid to the wife, she shall be entitled to retain it according to the unanimous view of Abu Hanifa, Imam Muhammad and Abu Yusuf. The husband will get only the consideration agreed upon.[9] But if the *mahr* has not been paid to her, then according to Abu Hanifa, she is not entitled to claim the *mahr* because, according to him, *khul'* puts an end to the rights which the spouses have against each other except the wife's maintenance and residence during her *iddat*. But according to Abu Yusuf and Imam Muhammad the wife shall be entitled to claim it from her husband because it becomes due if the marriage has been consummated.[10]

ii) If the marriage has not been consummated and the whole *mahr* has been paid to her, according to Abu Hanifa the husband will not be entitled to the return of any portion of *mahr*. He shall, of course, take the consideration that may have been agreed upon. But according to his disciples, the wife shall have to return half of *mahr*, to the husband and will be entitled to keep half of it.[12]

iii) If the marriage has not been consummated and *mahr* has not been paid to her, then according to Abu Hanifa no amount of *mahr* shall be due to her. She shall not be entitled to get her *mahr* or any portion of it from her husband and shall pay to

him the consideration agreed upon.[13] According to Abu Yusuf and Imam Muhammad, the wife shall be entitled to get half of her *mahr* from the husband.[14] The consideration agreed upon has, of course, to be paid by the wife to the husband in each case.

If the husband divorces his wife by *khul'* in consideration of her *mahr* and in case the marriage has not been consummated and the whole *mahr* has been paid to the wife, then the husband shall be entitled to its return by the wife. If it has not yet been paid to her, the husband's liability for the same shall cease.[15] There are two opinions expressed by Hanafi jurists. According to one, the same rule shall apply as held by abu Hanifa regarding *mahr* in *khul'*. But according to second opinion which is generally believed to be correct, the same rule shall apply as laid down by Imam Muhammad and Abu Yusuf.[16]

According to the Maliki view if the marriage has not been consummated and the parties settle *khul'* for a specified consideration, the wife shall have to pay the specified consideration and her right to get *mahr* shall get extinguished. She shall not be entitled to get the whole or any portion of it.[17]

According to Shafi'i view, if the spouses agree to a *khul'* for a particular consideration and the marriage has not been consummated, the wife shall be entitled to half of the *mahr*. If the whole *mahr* has been paid to her, she shall have to return half of it; while if it has not been paid to her, the husband has to pay half of *mahr* to her.[18]

According to Imam Ahmad Ibn Hanbal the right to *mahr* is not lost in consequence to the *khul'* and the husband remains liable for its payment if the same has not already been paid to the wife.[19]

Cases of *mubara'a*

Where the agreement to dissolve marriage emanates from a concurrent desire of both the spouses, the divorce is called *mubara'a* (that is by mutual consent). In such a case *iwaz* may or may not be specified. Where the agreement of *mubara'a* is silent on the question of *iwaz* the wife's entitlement to *mahr* is to be determined as follows:

i) according to Imam Abu Hanifa and Imam Abu Yusuf the presumption is that the husband's liability relating to *mahr* is discharged;

ii) in the opinion of Imam Muhammad al-shayabani the *mahr* is not discharged[20].

Cases of *faskh*

The termination of marriage by the *qadi*, either on his own initiative or at the instance of the wife or a third person is called *faskh*. In cases of marriage dissolution by *faskh* for determining the position of *mahr* broadly the rules determining the position of *mahr* in the cases of *talaq*, *khul'* etc. apply with modifications having reference to the defects of the spouses, consummation etc.

Under Sunni law a wife shall get the whole of her *mahr* if the marriage has been consummated or under the Hanafi, Maliki or Hanbali laws if there has been a 'valid retirement' irrespective of the fact whether it is dissolved by the husband or the *qadi*.[21] But in the absence of consummation or 'valid retirement' she shall be entitled to half of the *mahr* when marriage is dissolved by the husband.[22] If dissolved by the *qadi* on account of a defect in the wife, she shall not be entitled to get any *mahr* whatsoever.[23]

Under the Shia law if a marriage is cancelled before consummation either by the husband or the wife on account of the specified defects in the other, no *mahr* shall be payable to her.[24] This is subject to one exception, namely when the marriage is cancelled by the wife on account of husband's impotency, she shall be entitled to get half of her *mahr*.[25]

If the marriage is cancelled either by the husband or by the wife after its consummation, the wife shall get her full *mahr*.[26]

In a consummated marriage the unpaid *mahr* ordinarily becomes payable when the marriage is dissolved. If an unconsummated marriage is dissolved by the act of the wife no *mahr* is payable, where the wife exercises her 'option of puberty' before consummating the marriage no *mahr* is due.

Where a marriage is dissolved on the ground of husband's impotency, if the marriage has not been consummated (under Hanafi law including 'valid retirement') half the *mahr* is due if 'specified', if *mahr*

is not specified only *mata'* is due valuing under Hanafi law half of proper *mahr*. In an irregular (*fasid*) Hanafi marriage, if it has been consummated (actually not presumptively) the specified or proper *mahr* whichever is less, is due; in the absence of actual consummation no *mahr* is due. Under the Shafi'i and Ithna Shari laws, when a wife annuls her marriage (unilaterally and extra-judicially), before its actual consummation, on the ground of husband's insanity or inability to provide maintenance, she cannot claim any *mahr*; but if it has been consummated the whole *mahr* becomes due.

To sum up when a marriage is dissolved by the *Qadi* on account of some defect in the wife, her entitlement to *mahr* will be:

i) if unconsummated (actually or "presumptively") — no *mahr*;
ii) if consummated (actually or "presumptively") — whole *mahr* payable.

when the marriage is dissolved by either party due to other's defect (under Shia law) the position of *mahr* will be:

i) if an unconsummated marriage is cancelled either by the husband or the wife on account of specific defects (excepting husband's impotency) in the other — no *mahr* is due to the wife;
ii) in case of husband's impotency she shall be entitled to half of the *mahr*;
iii) if the marriage was consummated full *mahr* shall be due.

When the dissolution of marriage takes place by the act of the wife, she will be entitled to, if the marriage was —

i) un consummated — no *mahr*;
ii) unconsummated and dissolved by exercising option of puberty by her — no *mahr*;
iii) unconsummated (actually or "presumptively") and dissolved on the ground of husband's impotency — if specified, half of the *mahr* — if unspecified only *mata'* payable;
iv) unconsummated and annulled by her under classical Shafi'i, or Ithna Ashari law on the ground of husband's insanity or inability to maintain her — no *mahr*;
v) consummated and annulled as in (iv) — whole of the *mahr* payable;

vi) an unconsummated irregular marriage is repudiated by the wife — no *mahr* payable;
vii) a consummated (actually, not by "presumption") irregular marriage if repudiated by the wife — whole *mahr* payable.

Cases of *li'an*

In case of *li'an* the entitlement of the wife to *mahr* can be determined with reference to the following *hadith*:

Narrated Sa'ad bin Jubair:

> I asked Ibn Umar, "what is the verdict if a man accuses his wife of illegal intercourse". Ibn Umar said, "The Prophet (S.A.W.) separated (by dissolution of marriage) a couple of Bani al-Ajlan and said to them Allah knows that one of you two is a liar; so will one of you repent?. But both of them refused, so he (S.A.W.) separated them by divorce. The man said, "what about the *mahr* that I have given to my wife?". It was said, "You have no right to restore any money, for if you have spoken the truth you have also shared life with her and if you have told a lie, you are less rightful to have your money back."[27]

It can be inferred from this *hadith* that the position of women's right to *mahr* where marriage is dissolved by *li'an* will be:

i) if the marriage was consummated, the whole specified *mahr* or proper *mahr*, if it was unspecified;

ii) if the marriage was unconsummated, under general *Quranic* law the half of the 'specified' *mahr*; if *mahr* was unspecified, only *mata'*.

iii) if the whole or part of *mahr* has already been paid, guidance may be taken from the Quranic principle given below:

> Nor should ye treat them with harshness, that ye may take away part of the *mahr* ye had given them; except where they have been guilty of open lewdness;[29]

It may be pointed out that mere suspicion may not amount to open lewdness'. It warrants strict interpretation. This principle will ap-

ply to both consummated and unconsummated marriages as the *Quran* is silent about any distinction in this respect.

Cases of *ila'*

Ila' is a kind of desertion in which the husband decides to keep away from the wife without divorcing her. If the husband actually keeps away from the wife and does not resume cohabitation till the expiry of four months, the law enables the wife to become free from the marriage. In Hanafi law the marriage is automatically dissolved by *talaq*; in Shafi'i and Ithna Ashari laws the wife can sue for *faskh*.[30] Now where the marriage of a wife has dissolved through *ila'* her entitlement to *mahr* will be the same as in case of *talaq* if the Hanafi law is applicable to the parties or it will be the same as in the case of *faskh* if the Shafi'i or Ithna Ashari laws are applicable to parties.

Cases of *zihar*

The word *zihar* is derived from *'zahr'* (back). *Zihar* means "to oppose back to back". It is explained that when there is discord between the husband and the wife, they instead of remaining face to face towards each other turn their backs against each other. In the language of law it signifies a man comparing his wife to any of his female relations within such prohibited degree of relationship, whether by blood, fosterage or affinity, as renders marriage with her invariably unlawful. In such cases the husband is expected to expiate and resume cohabitation. The wife also becomes entitled to call her *muzahir* husband to return to his matrimonial duties and on his failure to do so approach the *qadi* who shall force the husband either to perform the necessary expiation or divorce the wife. Some authorities have laid down the rule that the *qadi* should give the husband three months time either to make expiation and to return to his wife or to divorce her. If the husband fails to do either, the *qadi* can use coercive measures to compel him to adopt one of the alternatives.[31] The general opinion is that the *qadi* cannot himself pronounce a divorce on behalf of the husband. However, in the subcontinent, if the husband continues to keep away from the wife, *faskh* may be sought by the wife under statutory law.[32]

From the nature of *zihar* it is clear that if the husband choses to divorce the wife, his liability for *mahr* of the divorcee will be the same

as that in *talaq*. But, if the marriage is dissolved by grant of *faskh* similar rules will apply, as discussed above.

Cases of khyar al-bulugh (option of puberty)

When the dissolution of marriage takes place by the exercise of 'option of puberty' and the marriage has not been consummated, the woman is not entitled to *mahr*; but if the marriage has been consummated, she is entitled to her full *mahr* irrespective of the fact whether the separation has taken place by her own option or by the option of her husband.[33]

Cases of irtidad or apostasy

If the marriage has been consummated or if under the Hanafi, Maliki and Hanbali laws there has been a 'valid retirement', the wife shall be entitled to her whole *mahr* irrespective of the fact whether it is the husband or the wife who has left the fold of Islam.[34]

If a marriage has not been consummated or under the Hanafi, Maliki and Hanbali laws there has not been a'valid retirement,' the wife shall get half of the *mahr* if it is the husband who has renounced Islam but she shall not be entitled to get any *mahr* if it is she herself who has renounced the faith.[35]

Cases of automatic dissolution of marriage

The automatic termination of marriage is called *furqah* (separation). In Islam marriage gets automatically dissolved on:

i) the death of one of the spouses;
ii) apostasy of one of the spouses;
iii) under the Sunni law, on the fulfilment of a condition in the case of a conditional divorce; or
iv) change of domicile in case of non-Muslims.

If a marriage is dissolved by the death or for a cause imputable to the husband then it has, generally speaking, the effect of *talaq* or divorce on the ground that the dissolution of marriage has been brought about by the husband and he should be deemed to have divorced his wife. Thus, if the marriage is dissolved on the ground that the husband

is impotent or insane or the like then the dissolution of the marriage will have the effect of talaq even though the marriage is dissolved by the *qadi* at the instance of the wife. The dissolution of marriage by or at the instance of a wife is called *faskh* (termination). If the marriage is dissolved due to a cause attributable to the wife then also it should have the effect of *faskh* or termination of the marriage by the wife. Thus if it is dissolved by the wife in the exercise of the option of puberty or by the *qadi* on the ground of some serious blemish in her, then it shall be deemed to be *faskh* by the wife.[36]

It may be added here that the above is not an invariable rule of law and there are certain exceptions to it. Thus, if a marriage is dissolved on account of the apostasy of the husband or adoption of a domicile in *dar al-harb* when the wife resides in *dar al-Islam*, then the dissolution shall be considered to be *faskh*, although the marriage is dissolved for a cause attributable to the husband.

The effect of both these methods, namely, *talaq* and *faskh* is the same as far as dissolution of marriage is concerned. The difference is in the extent of the husband's ability for payment of *mahr* and the number of divorces affected.

2. Ill-Assorted Marriages

A marriage can be dissolved at the instance of certain near relations of the wife if she contracts a marriage for a *mahr* which is less than the proper *mahr* in her family or if the husband is otherwise unequal to the girls family. *Mahr* is being treated as a criteria of inequality and such marriages between the unequals have been termed as ill-assorted marriages. By *mahr* in this respect is meant the proper *mahr* of the wife because there is no present liability for the payment of her deferred *mahr*. There, however, exists a difference of opinion as to whether the ability to pay the wife's *mahr* or maintenance is a condition of equality in marriage. Abu Yusuf does not hold it to be an essential condition on the ground that payment of *mahr* can admit delay, but the payment of maintenance cannot be delayed.[37] But the generally accepted view is that the husband's ability to pay the wife's *mahr* is an essential condition of equality in marriage.[38]

As already stated, the *mahr* of a girl should not be less than the proper *mahr* prevalent in her family. If the *mahr* fixed is less than the proper *mahr* then the man cannot be considered to be the equal of the girl. This matter may be considered from several aspects as given below:

Inadequate *mahr* agreed upon by the wife

When a girl contracts a marriage for an inadequate *mahr*, according to the Hanafi view her guardian for marriage or a near collateral can get the marriage dissolved on that ground.[39] This is based on the reason that the interests of the other girls in the family shall be adversely affected by this act of the wife. The fixation of lower *mahr* also affects the prestige of the girl's family.

Abu Yusuf and Imam Muhammad hold the view that the father or guardian or near relations are not possessed of any such authority.[40] They base their opinion on the ground that the *mahr* belongs to the wife and, therefore, she can lawfully relinquish a portion of it by accepting lower amount of *mahr*. They further contend that it is open to a woman after the amount of her *mahr* has been specified to relinquish a portion of it and that there is no difference in the cases when *mahr* is relinquished before or after, the marriage. Abu Hanifa argues that some importance and respectability are attached to a large amount of *mahr* while its smallness may be disgraceful to the wife's family, hence the guardian has a right to object to a small amount of *mahr*.[41] He further says that the relinquishment of *mahr* after marriage does not bring any disgrace to the family as is occasioned by the fixation of a small amount of *mahr*.[42]

Disproportionate *mahr* fixed by the father/guardian

If father or paternal grand-father should contract his minor child in marriage for an inadequate or too high a *mahr* the marriage is binding on minor, but if contracted by any other person, it is liable to be set aside on the suit of the minor.[43] But if the *mahr* is very low or high, then according to Abu Yusuf and Imam Muhammad, the marriage is not legal and can be set aside. They contend that the bidnging nature of a marriage by the father or grand father is based on the presumption that they are acting in the best interest of the child but where their disregard for the interests of the minor is apparent, this presumption cannot arise, and so the contract of marriage loses its binding force.[44]. Abu Hanifa does not agree with this view. He says

that the nearness of the relationship establishes the father's tenderness (affection) for minor and the amount of *mahr* is not the only consideration but there are many other considerations of still greater importance than the *mahr*, hence the marriage contracted by them shall be binding on the minor.[45] But this rule applies when the father's or grandfather's act is bonafide; if it is malafide or if he fixed the *mahr* while he was drunk, the marriage would not be binding on the girl.[46]

Inadequate *mahr* accepted by the guardian

If the marriage has been contracted by a guardian for a minor, whether a boy or a girl and the amount of the *mahr* is lower in the case of girl and higher in the case of a boy than the proper *mahr* prevalent in the girl's family, the marriage shall be considered unequal. The minor can apply in such a case, on attaining puberty, for the dissolution of the marriage on this ground. This rule seems to be based on the fact that it is against the interests of the boy or girl to agree to a higher or lower *mahr* than the proper *mahr*.

If the marriage for unequal *mahr* is contracted by some one other than the father or the grandfather of the girl then it is an agreed view that the girl possesses a right to get it dissolved.

3. **Other cases**

Marriage by agent for inadequate *mahr*

If a person appoints an agent to contract a marriage for him or her and the agent contracts the marriage for an unreasonably low or high *mahr* then the marriage shall not be binding because the fixation of a reasonable, that is, proper *mahr* was an implied condition of the marriage.[47] This rule, of course, is subject to the condition that the party concerned had not authorized the agent to fix the *mahr* at that amount.

Increment by the husband

The right to the dissolution of the marriage shall be lost if the husband should increase the amount of the *mahr* so as to bring it in conformity with the proper *mahr*.

Subsequent Relinquishment of *mahr* by wife

There is a difference of opinion about the relinquishment of the whole or a portion of her *mahr* by the wife subsequent to the time of the marriage, so that the inequality in the husband may be removed. The father or other guardians have ordinarily no right to object in such a case.[48] The Hanafis justify this opinion on the ground that the *mahr* belongs to the wife and she can deal with it in any way she likes. But it is stated in *Fatawa-i-Alamgiri* that if a woman marries a destitute person (beggar) and then she gives up her claim for her *mahr* even then the man shall not be considered to be the equal of the wife because the ability to pay the *mahr* is determined at the time of marriage,[49]

Impact of defects in spouses

Under Sunni law a wife shall get the whole of her *mahr* if the marriage has been consummated or under the Hanafi, Maliki or Hanbali laws if there has been 'valid retirement' irrespective of the fact that whether it is dissolved by the husband or the *qadi*[50]. But in the absence of consummation or valid retirement she shall be entitled to half the *mahr* when marriage is dissolved by the husband.[51] If dissolved by the *qadi* on account of a defect in the wife, she shall not be entitled to get any *mahr* whatsoever.[52]

Under the Shia law if a marriage is cancelled before consummation either by the husband or the wife on account of the specified defects in the other, no *mahr* shall be payable to her.[53]. This is subject to one exception, namely when the marriage is cancelled by the wife on account of her husband's impotency then she shall be entitled to get half of her *mahr*.[54]

If the marriage is cancelled by either the husband or the wife after its consummation, the wife shall get her full *mahr*.[56]

A wife shall be entitled to maintenance even when she suffers from some physical diability such as *rataq*, *qaran*, insanity, or has been so old as to become unfit for intimacy.[56]

4. ***Mahr* and *Iddat***

The only effect of *Iddat* on *mahr* arises in the case of a deferred *mahr* on the pronouncement of a revocable divorce. There is a

difference of opinion about the time when the deffered *mahr* becomes payable. According to one version the deferred *mahr* becomes payable on the pronouncement of the divorce while according to another version it does not become payable till the expiry of the period of *iddat*.[57]

An important result of this difference is that in former case the payment to *mahr* having become due on pronouncement of divorce, revocation of the divorce will not restore the nature of the *mahr*, that is, the *mahr* will not become deferred but shall remain immediately payable. In the other case the *mahr* being not due till after the expiry of *iddat*, a revocation of the divorce will not affect its payment and it will still remain deferred.

The second view is generally considered to be the correct view. It is stated in *Radd-al-Muhtar* that the *mahr* shall remain deferred till the expiry of the period of *iddat* and shall become prompt only on the expiry of that period. It is also stated therein that this is the usually accepted view.[58] In case of irrevocable divorce, the *mahr* becomes immediately payable on such prouncement as an irrevocable divorce puts an immediate end to the marriage.[59]

5. Deceased Wife's *Mahr*: Obligation of Widower

If any portion of the deceased wife's *mahr* was, under the contract of marriage or by operation of law payable by the husband on her death, the same can be claimed by the legal heirs (*warison*) of the deceased wife (including the husband himself).

In the case of such a claim by any of her heirs other than the husband himself, he must discharge the liability unless he proves that before her death the wife had lawfully agreed to forgo the *mahr*.

If the wife predeceases the husband, the heirs of the wife, including the husband, become entitled to her *mahr*; and he is liable for the amount less by his share.[60] They can sue him severally each for his or her share, but for a proper adjudication, all the heirs should be joined as parties to the action. In *Mohammad Ishaq*[61] one of the heirs was not made a party until more than three years from the death of the wife. The husband contended that the suit which was brought by another heir was barred. The High Court overruled the objection and decreed the claim.

In *Mubarak-un-Nissa* v. *Mansab Hassan Khan*[62] it was provided in the deed of *mahr* that the wife was to take possession of certain property in lieu of her *mahr*, and enjoy the usufruct thereof, but in case she predeceased the husband it would revert to him and if he predeceased her, the property would become hers absolutely.

The husband having died before the wife, a question arose between the widow and his other heirs as to the effect of the deed of *mahr*. The High Court of Allahabad held that the agreement was neither a mortgage by conditional sale nor the special form of transaction known by the term *muba'hat* but that it was a contract between the parties which was binding on their representatives.

In another case *Mohammad Yakub Hussain*[63] the Allahabad High court carried further the effect of an agreement between husband and wife. In this case a dispute between the parties was referred to arbitration with the result that an agreement was arrived at, confirmed subsequently by an award of the arbitrators that a certain property should be transferred in present to the wife in lieu of her *mahr* with a control to the husband over the application of the income. It was provided, however, that if she predeceased him, he should continue in possession during his life, but that if he died before her, she should become the owner and his heirs should have no right to interfere with her possession. On the question as to the effect of this agreement, the High Court held that the award was sufficient to transfer the property and that no further conveyance was necessary.

6. Cases under Kazimi Act, 1939

Background of the Act

The Kazimi Act, officially called the dissolution of Muslim Marriages Act, 1939, enables a Muslim wife in India to seek the dissolution of her marriage by judicial decree on some specified grounds. The Act, in reality, incorporates one of the modes of dissolution of marriage under Islamic Law called *faskh*. It means the annulment of marriage by a *qadi*. In India under the Act, the position of the courts has been held to be akin to that of a *qadi*[64].

Before the enactment of the Kazimi Act, 1939 the Courts in India, following the Hanafi law as the main rule of decision, had

denied to Muslim women the right of the dissolution of marriage through *faskh*. This had become a cause of misery for many women. The Shafi'i and Ithna Ashari laws (unlike the Hanafi law) allow a wife to annul her marriage by her unilateral action and without the intervention of the Courts on the grounds of insanity, impotency and non-maintenance. Hanbali law is equally suitable to women. However, on comparison in this respect the Maliki law has been found to be most favourable to them.[65]. It was on the basis of this comparative suitability that Maulana Ashraf Ali Thanwi rightly gave a valid solution to the problem of 'non-availability of the remedy of faskh'. His was the suggestion of resorting to the doctrine of *takhayyur* which permits an adoption of the most suitable rules for decision making in Islamic law transcending the school divergences.[66]. He made an exposition of this principle in his book *Al-Hilat al-Najizah-lil-Halilatil'Ajizah* giving a detailed account of Maliki law on the subject. Pursuant to the approval of this book by various Ulema a bill was introduced by Muhammad Ahmad Kazimi in the central legislature on April 17, 1936 which led to the passing of the Dissolution of Muslim Marriages Act on March 17, 1939.

In Section 2 of the Act various ground have been mentioned on the basis of which a Muslim woman can claim dissolution of her marriage by a Court decree. These include the grounds of 'missing-husband' non-maintenance, imprisonment of husband, impotence, insanity, leprosy, venereal diseases, option of puberty, cruelty and any other ground that may be available under *Shariah* like *li'an* etc.

Provision related to *mahr*

Section 5 of the Act is related to mahr which reads as follows:

> "Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her *mahr* or any part thereof on the dissolution of her marriage."

This is a vague provision though it can be understood to mean that the position of *mahr* of a woman obtaining dissolution of marriage under the Act will remain the same as it is under the classical Muslim law and it will not be affected by the provisions of the Act.

Since in this legislation mostly the rules of Maliki law relating to wife's right to claim dissolution of marriage were adopted, there was obviously an apprehension that the Courts may apply Maliki rules relating to *mahr* to the cases where a marriage is dissolved under the provisions of this Act. This could have excluded the application of Hanafi, Shafi'i and Ithna Ashari rules about *mahr* which most probably the legislature wanted to save. The difficulty in the ascertainment of the rules of Maliki law on *mahr* might also have been apprehended by the legislature. Awaiting a judicial verdict, the question that remains open is that whether the position of *mahr* in the marriage dissolved under the Kazimi Act will be determined by the same rules of Hanafi, Shafi'i or Ithana Ashari laws which are applied to the cases of *talaq* or *khul'*. This is a delicate issue and needs a careful consideration taking guidance, of course, from the nature of the legislation itself.

The nature of the Kazimi Act has been described by the Courts in India in the following terms:

> "The Act is a piece of declaratory legisaltion...."[67]

> "The Act crystallizes only a portion of Muslim law and should, therefore, be applied in conjunction with the provisions of the whole of Muslim law."[68]

Thus to find out the position of *mahr vis-a-vis* the grounds of marriage dissolution enshrined in the Act, a reference to the relevant classical Islamic law is indispensable.

The relevant classical views

Under classical Islamic law the position of *mahr* with respect to the various forms of marriage dissolution is not the same. Some of the generally approved views under the classical law are advisably re-stated below briefly.[69]

When the marriage is dissolved in pursuance of an agreement of *khul'* or *mubara'a* between the spouses, the wife's right to *mahr* will be determined by the terms of the agreement. Where the agreement is silent on this point, conflicting opinions are found about the position of *mahr* in those marriages:

i) In case of *khul'*:

a) According to Imam Abu Hanifa the husband's liability for *mahr* is discharged;
b) according to both of his disciples (Imam Abu Yusuf and Imam Muhammad al-Shaybani) it is not discharged.[70].

ii) In case of *Mubara'a*:

a) according to Imam Abu Hanifa and Imam Abu Yusuf the presumption is that the husband's liability relating to *mahr* is discharged;
b) according to Imam Muhammad al-Shaybani, the *mahr* is not discharged.[71]

When the dissolution of marriage has taken place by the act of the wife, the rules which are generally applicable for the determination of her right to *mahr* are:

i) if unconsummated — no *mahr*;
ii) if unconsummated, dissolved by exercising 'option of puberty' by her — no *mahr*;
iii) if unconsummated (actually or "presumptively") and has been dissolved on the ground of husband's impotency — if specified, half of the *mahr*, if unspecified, only *mata'* is payable.
iv) if unconsummated, and annuled by her under classical Shafi'i or Ithna Ashari law on the grounds of husband's insanity or inability to maintain her — no *mahr* is due;
v) if consummated, and annuled as in (iv) — whole of the *mahr* is due.
vi) if unconsummated irregular marriage is repudiated by the wife — no *mahr* is due.
vii) if consummated (actually not "presumptively") irregular marriage is repudiated by the wife — "whole *mahr* " is due.

When a marriage is dissolved by the *qadi* on account of defects in the wife, her entitlement to *mahr* will be:

i) if unconsummated (actually or "presumptively") — no *mahr*.
ii) if consummated (actually or "presumptively") — whole *mahr*.[72]

Where the marriage is dissolved either by the husband or by the wife the position of *mahr* under Shia law will be as follows:

i) if an unconsummated marriage is cancelled either by the husband or the wife on account of specified defects (excepting husband's impotency) in the other no *mahr* is due to wife;[734]
ii) in case of husband's impotency the wife shall be entitled to half of the *mahr*.[74]
iii) if the marriage was consummated full *mahr* is due to the wife.[75]

Position of *mahr* under the Act:

In view of the above mentioned principles of classical Islamic law, the position of *mahr* on the dissolution of marriage under the Kazimi Act will be as follows:

Missing Husband

In case of a marriage dissolved on the ground that the whereabouts of the husband have not been known for a period of four years, the wife will be entitled to:

a) if consummated — whole of *mahr* (specified or proper) as the case may be;
b) if unconsummated — no *mahr*, but *mata'*.

Non-maintenance

Regarding the dissolution of marriage on the grounds of husband's neglect or failure to maintain the wife for a period of two years a controversy is existing as to the fact that whether the 'neglect or failure' on the part of the husband must be 'wilful' or a mere neglect or failure' even if the wife is responsible for that. The marriages have been dissolved by the Courts not only on the ground of 'wilful' neglect or failure on the part of the husband but also where the cause for such a failure was supplied by the wife.[76] The position of *mahr* in both these cases cannot logically be the same. So we have two kinds of cases under this clause with different positions of *mahr*:

a) where a marriage is dissolved for the wilful failure of the husband, the wife will be entitled to:

1) if consummated — the whole *mahr*;
2) if unconsummated — half of the specified *mahr*; where *mahr* is unspecified — only *mata'*;

b) where the marriage is dissolved on the ground of 'non-maintenance', but the cause for that was supplied by the wife through her refractiveness etc. she will be entitled to;

1) if unconsummated — no *mahr*
2) if consummated — in such cases, we submit, the wife may be deemed to have given up her claim to *mahr* in full or in part as the situation may demand as per the wife's desire to separate and husband's innocence; or it be treated as a *khul'* with judicial intervention.

Husband's imprisonment

Where the marriage has been dissolved on the ground of husband's imprisonment for a period of seven years or more the possible position of *mahr* can be:

a) if consummated — whole *mahr* is to be realized from the husband's property, if any;
b) if unconsummated — half of the 'specified' *mahr*; where *mahr* is unspecified, *mata'*.

Non-performance of marital obligations

When the marriage has been dissolved on the ground that the husband has failed to perform without reasonable cause marital obligations for a period of three years, the wife will be entitled to:

a) if consummated — the whole *mahr*
b) if unconsummated — half of the specified *mahr*; where *mahr* is unspecified, *mata'*.

Impotency

Where the marriage has been dissolved on the ground of husband's impotency the wife will be entitled to:

a) if unconsummated — half of the specified *mahr*; where *mahr* is unspecified, *mata'*;
b) if consummated 'presumptively' on the insistence of the husband — the whole *mahr* (we submit).

Insane or unhealthy husband

In case of a marriage dissolved on the ground that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease, the wife will be entitled to:

a) if consummated — whole *mahr*;
b) if unconsummated — no *mahr* but *mata'*

Option of puberty

Where the wife repudiates her marriage on attaining puberty she will be entitled to:

a) if unconsummated — no *mahr*;
b) if consummated (the wife having no knowledge of the right before) — the whole *mahr*.

Cruelty

Where the marriage has been dissolved on the ground of husband's cruelty to the wife she will be entitled to:

a) if consummated — whole *mahr*;
b) if unconsummated — no *mahr*, but *mata'*.

Any other ground available under Muslim Law

The Act authorizes the courts to dissolve a marriage on any other ground which is recognized as valid by the Muslim law. This is in fact a preservation of the grounds of marriage dissolution under Islamic law like *li'an* etc. So in such cases the entitlement of the wife to *mahr* will also be determined under the classical law.

7. Shah Banu Ruling and the Muslim Women Act: Impact on *Mahr*

Background

In India, to make a speedy remedy available to the wives for the enforcement of their maintenance claims, provisions were incorporated in the Code of Criminal Procedure (Cr. P.C.) 1898. This Code was replaced by a new one in 1973. In the code of 1973 the provisions relating to the maintenance claims were retained in Sections 125-128 with a significant change, whereby the divorced wives have been made able to claim maintenance from their erstwhile husbands even after divorce upto remarriage or death, whichever is earlier.[77] These provisions with an obvious contradiction with the *Shariah* were sought to be modified by the Indian Muslims so far as their application to them was concerned. Pursuant to this demand an exception clause, in general terms, was added to these provisions in section 127(3)(b) of the Code in favour of any person who may have discharged his liability towards the divorcee under the personal law. Under Section 127(3)(b) the magistrate is required to cancel any maintenance order passed under section 125 if;

> "She (the divorcee) has received, whether before or after the date of the said order the whole of the sum which under any customary or personal law applicable to the parties, was payable on such divorce."

Whether irony or irradiation it is, that in 1979, the Supreme court brought to the focus another dimension of these provisions in the following words:

> The purpose of the payment under any customary or personal laws must be to obviate destitution of the divorcee and to provide her with wherewithal to maintain herself. The whole theme of S. 127(3)(b) is manifestly to recognize the substitute maintenance arrangement by lumpsum payment organized by the custom of the community or the personal law of the parties.[78]

Thus, even a Muslim husband who had discharged every liability under his personal law, would be held to be bound to maintain his wife even after divorce and after the expiry of *iddat*. The same trend was maintained by the Supreme Court in subsequent cases like *Faz-lunbi*

v. K. Khader Vali[79] and the most famous case of *Muhammad Ahmad Khan* v *Shah Bano Begum*[80]. Consequently the protection which was intended to be given to Muslim law against supersession by section 125 of the Cr. P.C., through section 127(3)(b) proved to be quite insufficient. For this reason and the Supreme Court's taking into its own hands the interpretation of the *Quran* started a countrywide agitation against the *Shah Bano* decision. Consequent upon the Govt. of India got a new enactment passed by the Parliament tilted as Muslim Women (Protection of Rights on Divorce) Act., 1986 to undo the effect of *Shah Bano* ruling.

In all these decisions which led to the enactment of the Muslim women Act, 1986 *mahr'* has received both just and unjust treatment at the hands of the judges. In the *Bai Tahira* case the Court treated *mahr* as one of the 'substitute payments for maintenance' under Muslim Personal Law:

> "Payment of *mahr* money as a customary discharge is within the cognizance of that provision" [i.e. Section 127(3) (b)][81]

These words from the Supreme Court judgment in *Bai Tahira* create a wrong impression about *mahr*, as if it is an incident of divorce rather than an effect of marriage. Islam has ordained *mahr* as a separate right of the Muslim women. It is neither a provision for maintenance nor something to be given in lieu of maintenance. It has its own social and legal purposes.

Later the Supreme Court appreciated the difference between *mahr* and maintenance in the following words:

> "The quintessence of *mahr* whether it is prompt or deferred is clearly not a contemplated qualification of a sum of money in lieu of maintenance upon divorce."[82]

The difference between the *mahr* and maintenance was further made clear by the Supreme Court itself in 1985 in the case of *Muhammad Ahmad Khan v., Shah Bano Begum* in the following good or bad terms:

> If *mahr* is an amount which the wife is entitled to receive from the husband 'in consideration' of the marriage, that is the very oppo-

> site of the amount being payable in consideration of divorce ... No amount which is payable in consideration of marriage can possibly be described as an amount payable in consideration of divorce. The alternative premise that the *mahr* is an obligation imposed upon the husband as a mark of respect for the wife is wholly detrimental to the stance that it is an amount payable to the wife on divorce ... He does not divorce her as a mark of respect. Therefore, a sum payable to the wife out of respect, cannot be a sum payable on divorce'[84]

Further it was observed:

> Deferred *mahr* (even if) payable at the time of dissolution of marriage, cannot justify the conclusion that it is payable 'on divorce'.[85]

It was concluded that *mahr* is not a sum payable on divorce and is not a substitute payment for maintenance. But the divergence in the Court deliveries about *mahr* and maintenance *vis-a-vis* Section 127(3)(b) Cr. P.C., cannot be carried too far. In *Bai Tahira* the Court treated *mahr* as a 'customary discharge' within the cognizance of Section 127(3)(b). As per that judgment an adequate amount of *mahr* could have exonerated the husband from liability under Section 125. In *Shah Banu*, the Court held that it had been in error in its earlier judgment, and that *mahr* does not fall within the meaning of Section 127(3)(b). The reality is that if the amount of *mahr* with or without any other property of the wife, was sufficient to make a woman able to maintain herself she could not claim relief under Section 125. In other words, while determining the ability of the wife to maintain herself under Section 125 the court would take into consideration the whole property of the wife including *mahr*. So the differentiation made between *mahr* and maintenance in *Shah Bano* loses its merit. It may, however, be pointed out that the differentiation between *mahr* and maintenance is quite understandable and fully maintainable under Islamic law which, unfortunately, in the scheme of maintenance law under Cr. P.C., as applied by the Courts in India has missed its clear appreciation.

Provisions of the Act related to *mahr*

Section 3 of the Act contains a list of the benefits and properties which can be claimed by a wife on divorce, failing which she can seek

magesterial action. Mention of *mahr* has been made in section 3(1)(c) of the Act in the following words:

> "A divorced woman shall be entitled to an amount equal to the sum of *mahr* agreed to be paid to her at the time of her marriage and at any time thereafter according to Muslim law".

In this clause the words "an amount equal to the sum of ... *mahr* agreed to be paid", are full of perplexity and confusion. It leads one to a clumsy situation of choosing the best from all the worst that it can be supposed to mean. Shrouded with controversy the provision seems to have laid down that:

i) even if full or part payment of the specified *mahr* has already taken place before divorce the wife will be entitled to a further amount equal to such *mahr*, specified and discharged already; and

ii) if the sum of *mahr* was never fixed by the parties to the marriage then she will not be entitled to anything — when she is entitled to proper *mahr* under Shariah.[86]

The result is that in the cases falling under situation (i) double payment of *mahr* will be due to the wife from the husband. Contrarily in the cases falling under situation (ii) no *mahr* will be payable.

Also, from the clause under discussion it is not clear that what will be the entitlement of the divorced women when:

i) no *mahr* was fixed by the parties but the husband has paid in full or part the 'proper' *mahr* to her during marriage;
ii) she is under Muslim law entitled to either no *mahr* or only a portion of it;
iii) the *mahr* was reduced or enhanced before divorce;
iv) the *mahr* was fully remitted by her.

Moreover, from the scheme of the Act one feels that *mahr* stands shifted from its basic position of being an independent institution of Islamic law and has been made a part of the maintenance law as was done by the Supreme Court in *Bai Tahira*.

The fact is, as observed by Professor Tahir Mahmood that:

> "The provisions of the Act relating to *mahr* are badly drafted and do not represent the true principles of Islamic law.[87]

Some cases decided under the Act of 1986 — e.g. *Arab Ahmad bin Abdullah v. A. B. Mohmuna Saiyadbhai*[88], however, show that the Courts, have consciously or unconsciously counted *mahr* as an additional payment different from ordinary maintenance. The distinction must be properly understood and maintained.

8. *Mahr, Nafaqah & Mata'*:Nature and Inter-Relationship

Mahr is a gift spontaneous to be presented to the wife by the husband on *nikah* with a willing heart. This is an honour to the bride from the husband. He by this makes a manifestation of his sincerity to respect her rights to his fullest possible capability. So *mahr* is a symbolic representation of the earnestness in sharing love and a vow to stand by each other with the object of transcendent tranquility under the chaste alliance known as *nikah* (the basis of the fundamental unit of Islamic society — the family)., This is the basic purpose of *mahr*.[89]

The amount of *mahr* must be in accordance with the position of husband and the wife. The amount must not be in excess of their capabilities. Hazrat Umar(R.A.) has opinied **that unreasonable amounts of *mahr* should neither be stipulated nor paid or received** as this is, in the final analysis, at variance with the object and purpose of *mahr*. He once remarked:

> You should not fix unreasonably high amounts of *mahr* because if it would have an element of wordly nobility or divine felicity, then the Apostle was the most worthy of it all.[90]

The unreasonably high amount of *mahr* can be a source of unnecessary anxiety creating strain on the union followed by doubt and suspicion resulting into divorce. In such circumstances *mahr* usually remains unpaid and also there remains no possibility of lawful remission of *mahr*. The *mahr* remaining unpaid is being claimed after dissolution of marriage because of which, unfortunately, some confuse it either with earlier concept of dower at common law or with substitute maintenance of divorced women.[91]

Nafaqah is the means of sustenance (including every reasonable facility of life) to be kept available by the husband to the wife during the subsistence of *nikah*. This is to facilitate ordinarily a joint living of the wife with the husband and performance of matrimonial obligations. This brings a family into existence and provides a ground for its endurance. Without *nafaqah* matrimonial home is neither desirable nor possible.

Basically the obligation of the husband is that of *quwwam* (procter and maintainer) towards the wife and when the children are born the liability extends to maintain them also. So the purpose behind the *nafaqah* is the strengthening of family ties creating a chaste social order. The moment the basic fibre of the family is hit the maintenance stops. Therefore, if the wife becomes refractory (*nashizah*), she loses her right to maintenance or if the *nikah* is broken the right to maintenance ceases. It only continues upto the expiry of *iddat* during which the *nikah* is notionally supposed to continue so that the possibility of reconciliation is worked out by the parties or any pregnancy of the wife is determined for the clarity of parentage. A refractory or adulterous wife is not entitled to *iddat* maintenance.[92]

Mata' is the parting gift to be offered to a wife on separation due to the dissolution of marriage by the husband. It must be given with humility and kindness to remove any cause for accusation or shame which may arise from divorce which is in Islam the most detestable act. The obligation of *mata'* creates a possibility of more social interference by the relatives and friends which can cause more thinking about separation and may stimulate a reconciliation.

Ultimately, if the result is separation, *mata`* will be due to the wife as a parting gift. It falls in line with the Quranic directive:

> "either retain them (the wives) with kindness or part from them with mercy"[93]

In the scheme of the law relating to *nikah* all the three obligations of *mahr, nafaqah* and *mata'* have, therefore, a successive role to perform on *nikah*, during *nikah* and on termination of *nikah* respectively. All these, however, aim at one common objective, that is, strengthening of the family. Now where a breach occurs with respect to the

payment of *mahr, nafaqah* or *mata'*, legal action follows for their enforcement.

Mata' must not be confused with *nafaqah* (maintenance). In no sense *mata'* means maintenance from an erstwhile husband. The right to maintenance gets suspended even during the marriage for some just cause (for example, when the wife becomes a *nashizah* (refractory). There can be no reason to grant maintenance to such a wife after divorce. But such a wife is also entitled to *mata'* on the dissolution of her marriage. Had *mata'* been same as maintenance then *mata'* would never have been payable to a refractory wife or *nashizah*.

Moreover, *mata'* in its actual nature, is a gift and relates to some definite occasion while as maintenance right relates to time periods. It becomes due with respect to a time period and gets suspended or withdrawn accordingly. In law also maintaince is always determined with respect to time. In the Quran where word *mata'* is used in the meaning of maintenance, the time period is specificied with it. Where it is used to denote a gift (II:236, 241); enjoyment (ii:193 IV:77), profit(XVI: 177), comfort (IX:38) a little enjoyment (X:70) possession (III:34), for use and convenience (LXXIX:37; LXXX:32) in such cases the time period is not specified with it.

Mahr, nafaqah and *mata'* have existed as independent institutions of Islamic Law through out its history. Modern instances can also be found in some cases available in which *mata'* has been treated as a separate claim in addition to other claims.[94]

9. Common Usages in Kashmir Valley

Divorce in Kashmir is very rare. Some of the facts that have come for observation during this study about the practices related to *mahr* and divorce are as follows:

i) Most of the dissolutions take place after conciliations cum arbitration by relatives and local respectable people. The rights of the separating parties depend upon the terms of agreement reached ultimately between them.

ii) Where the husband divorces his wife, the unpaid *mahr* becomes payable to her immediately. Where people feel that injustice has been caused to the wife they help the divorcee in realization of her unpaid *mahr*. The males who divorce women find it ordinarily difficult to remarry.

iii) Where the wife seeks the dissolution of marriage, the husband claims an amount equal to or more than *mahr* as *iwaz* for *khul'*.

iv) In some cases of breakdown of marriage both the parties desire separation but each one wants the other to express his or her desire for divorce and not his or her own. The wife wants to protect her *mahr* and the husband wants to claim *iwaz*. In such cases marriage remains intact, of course undesirably, for years together but parties maintain their separate residences. Such matters are lastly being settled through local conciliation cum arbitration or otherwise remain unresolved for ever.

v) A divorced woman on divorce sometimes offers to give up her claim to *mahr* and agrees to the return of *thān* and *zewar* and retain her child or children. This has actually been agreed in many cases. Such divorcees do not intend to go for remarriage.

In Dogra's Code insufficient entries are found in its relevant Question 24 which are to the effect that:

i) On divorce, divorced wives get their deferred *mahr* even if they are divorced on the ground of adultery. But the Sunni Mussalmans of Anantnag, Baramulla, Sopore, Nunar and Srinagar and Gujjars of Nunar make exception to this. They do not pay deferred *mahr* to the wives divorced on the ground of adultery.

ii) Bakerwals and other tribes of Pakhil get the payment of *mahr* cancelled by forcibly transmitting divorce into *khul'*. An adulterous woman is never divorced until she supplicates for *khul'*.

On actual survey it is found that the Kashmir society has been most chaste. Exclusive reference to this single, locally insignificant, issue by Sant Ram Dogra in his Code appears as motivated by *malafides*.

References

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2. Consummation includes 'Presumptive' consummation under Hanafi, Maliki and Hanbali Laws: Ibn Qudamah *Al Mughni*, Vol. VI. P. 654 (*Cairo*, 1367 AH).
3. This rule was applied by Madras High Court in *Tajbi V. Nattar Shariff* AIR 1944 Mad. 888.
4. *Mata'* is a benefit to be given to the wife which under Hanafi law cannot be more than half of *mahr*.
5. Maulana Ashraf Ali Thanwi, *Bihishti Zewar*, Vol. IV P. 15.
6. The Quran,. 2:229
7. For the full text of the *hadith* see above Chapter - II. *Origin and development of law on Mahr*.
8. *Hedaya, Fatawa-i-'Alamgiri* and *Bihishti Zewar* refer to the former opinion as the law but the Courts usually apply the concurrent opinion of the disciples where both of these differ from the great Imam: (i) *Agha Ali Khan V. Altaf* (1982) 14 All 429 (ii) *Abdul Kadir V. salima* (1886) 8 All, 149.
9. *Fatawai Qadi Khan*, Vol. III, P. 256 (*Kanpur*, 1310 AH)
10. *Ibid*
11. *Ibid*
12. *Ibid*.
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16. *Ibid*
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18. Ibn Qudamah, *Al-Mughni*, Vol. VII, P. 56 (*Cairo* 1367 AH)
19. *Ibid*
20. The majority opinion has been supported by Maulana Ashraf Ali Thanwi, *Bihshti Zewar* Vol. IV, P. 40.
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25. *Ibid*
26. *Ibid*
27. *Mussand Imam Aizam*, Kitab al-talaq, P. 273 (*Deoband*, 1967)
28. The Quran 2: 236, 237
29. The Quran 4: 19
30. Supra note 1 P. 107
31. 'Jaffar b al-Hassan. Kitab *Sharai al Islam*, P. 222 (*Tehran*, 1377); Abu al-Hassan al-Musawi, *Al Istibsar*, vol. III, P. 389 (*Najaf*, 1956)
32. Section 2(ix) of the Dissolution of Muslim Marriages Act, 1939.

33. *Al-Fatawa al-Hindiyah* Vol. II, P. 11 (*Kanpur*, 1349 AH)
34. Ibn Abidin, *Radd al-Muhtar*, vol. III, P. 402 (*Cairo*, 1318 AH)
35. *Ibid*.
36. *Id*. Vol. III, P. 315. *Faskh* is the termination of mariage by the *qadi* either on his own initiative or at the instance of the wife or any third person.
37. Al Marghinani, Ali B. Abi Bakar, *Al-Hedaya*, Vol.II, P. 301 (*Delhi, n.d.)*
38. *Id*. at P. 300; Supra note 33, P. 13
39. Supra note 37; Supra note 34, Vol. II P. 305.
40. *Ibid*
41. *Ibid*
42. *Ibid*
43. *Ibid*
44. *Id*. at PP. 301-302
45. *Id*. at P. 302
46. Supra note 33, P. 15
47. *Id* at P. 16; Supra note 34, Vol, II. P. 313
48. Supra note 37 at P. 300
49. Ameer Ali Urdu Trans. of *Fatawai Alamgiri*, Vol. II P. 13 (*Lucknow*, 1899 AD)
50. Supra note 21'
51. *Ibid*.
52. *Ibid*.
53. Supra note 24
54. *Ibid*
55. *Ibid*
56. Supra note 49, P. 407
57. Supra note 34, Vol. VII p. 668
58. *Id* at P. 368.
59. *Ibid*.
60. *Ali Bukhsh Khan V. Kaeem, Bibee*, I. Sel. R. 86 note (24th August, 1804)
61. *Mohammad Ishaq, V. Sheikh Akramal Haq* (1907) 12 CWN, 84.
62. *Mubarak-un-Nissa v. Mansab Hassn Khan* (1911) I.L.R. 33 All 421.
63. *Muhammad Yakub Hussain V. Inayati Jan* (1911) I.L.R. 33 All 683.
64. *Mt. Umar Din V. Muhammad Din* AIR 1945 Lah 51 (D.B.)
65. Fyzee, A.A.A., *Outlines of Mohammadan Law*, P. 169 (4th ed.)
66. For *Takhayyar*, see generally supra note 1.
67. *Fazal Begum v. Hakim Ali*, AIR 1941 Lah 22.
68. AIR 1951 Nag. 375.
69. For details see above in this chapter.
70. Supta note 8
71. Supra note 20.
72. Supra note 21
73. Supra note 24
74. *Ibid*
75. *Ibid*

76. A. *Yusuf* V. *Sowrama* AIR 1971 Ker 261.
77. Section 125 of Code of Criminal Procedure, 1973.
78. *Bai Tahira* V. *Ali Hussain*, AIR 1979 SC. 362 at pp. 365-366; Emphasis added.
79. AIR 1980 SC 1730.
80. AIR 1985 SC 945; For details see *Infra* note 94.
81. Supra note 78
82. Supra note 79 at 1736.
83. Supra note 80
84. *Id* at PP 952-953.
85. *Ibid*; See for comments Lucy Carrol, *"Divorcees' Mahr and Muslim women's Right to Maintenance"*, 27 JILI, PP 487-495.
86. See for comments from Tahir Mahmood, Islamic CLQ (1986) PP. 172-173.
87. *Ibid*.
88. AIR 1988 Guj 141; Any discussion on the main issue in this case is beyond the scope of this work. See *Infra* note 94.
89. See above Chapter I, *Introduction*
90. Professor M. Taqi Amini, *Time Changes and Islamic Law*, P. 184-85, 210 (English translation by Prof. Ghulam Ahmad Khan).
91. Supra note 89
92. Hedaya P. 72, 145-46 (Hamilton's Translation, 1870 ed. by Grady).
93. The Quran, II: 229; Some people, though consider *mata'* different from *nafaqah*, present a muddled view of it, see ASIL (1985).
94. For further study on this see my another work — *Islamic law on Maintenance of Women, Children, parents and other relatives*, (Qazi Publishers, Delhi, 1995).

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Chapter - VIII

REVIEW OF THE STATUTORY LAWS RELATED TO MAHR IN MUSLIM COUNTRIES

I. The Subject

Mahr is a 'gift' which a Muslim husband is bound to present to his wife on marriage as a symbol of honour and affection. It manifests the Islamic policy of equitable marital status and property rights of women. Given so, it invokes friendship, sincerity, tolerance and respect in reciprocity. Its significance can be better appreciated in the context of the nature of women and the historical unfolding of their miseries and deprivation. Islam describes men and women as each others "garment" and "potential"with just position for both in the matrimonial home as well as in the society. It negates the concept of merger of the personality of the wife into that of her husband on marriage. Under Islamic Law *mahr* is legally enforceable and any breach of it warrants legal action.

The basic foundations of law on *mahr* are found in the Quran and *ahadith*. The task of working out further details was performed by the jurists. Some local practices have also found place in the law on *mahr*. Now in various Muslim countries, during the present century, some codification of personal laws has taken place which covers the subject of *mahr*, too. Thus the law on *mahr* is presently constituent upon the Quranic directives, *ahadith*, juristic expositions, some local practices and the modern legislation. In this chapter we will underline the relevant areas of the subject which have been brought under legislation and assess the merit and utility of this legislative effort.

II. Statutory Provisions: the Context and the Content[1]

It may be pointed out that yet no Muslim country has a complete set of statutes on *mahr*. But, the provisions from relevant

enactments of different countries plus the Ottoman Law of Family Rights, 1971, taken together constitute a considerable body of regulations which covers most of the notable aspects of *mahr*. These aspects may be taken for examination, one by one.

1. Definition of *Mahr*

Morocco

Of all the relevant legislations in various Muslim countries the Moroccan code of Personal Status, 1958 enjoys the distinction of giving a definition of *mahr*, which reads as follows:[2]

> "*Mahr* means any property given by the husband to the wife representing his intention to have a family based on mutual affection and Company."

The definition is appropriate and conforms to the main purpose of *mahr* in Islamic law, i.e., to have a peaceful and tranquillus home. When the husband presents *mahr* to the wife, it creates in her a feeling of familiarity and affection about the matrimonial home, making it a comfortable abode for both. So has the Quran also described *mahr* as a "gift spontaneous" (a gift with a willing heart)[3].

2. Nature of the right to *mahr*

Mahr as a symbol of conferment of property rights on women by Islam exclusively belongs to the wife. She, therefore, enjoys absolute ownership over the subject matter of *mahr*. This principle has now attained statutory form in many Muslim countries.

Lebanon

About he nature of *mahr*, the Ottoman Law on Family Rights, as is applicable in Lebanon[4], says:[5]

> "*Mahr* is the property of the wife, she cannot be compelled to make provision of the house hold goods from it".

Morocco

The Moroccan code provides[6]:

> "*Mahr* is the property of the wife which she can dispose of as she wants. The husband cannot set-off any part thereof against any household goods given by him to the wife."

It further declares:

> "The father or guardian of a bride cannot demand from the husband any money for handing her over to him or for acting as guardian."

Tunisia

The Tunisian Uniform Code of Personal Status, 1956-81,also embodies the same principle in following terms:[8]

> "... *Mahr* is wife's property which she may dispose of as she wishes."

3. Subject matter of *mahr* (what can count as *mahr*?)

According to the classical authorities *mahr* can be any property (*māl*), monetary or non- monetary, having value. where it is non-monetary the thing to be given must be certain. *Mahr*, however, cannot be a mere promise to do or to abstain from doing something not enforceable by the court.[9] Legislations in this respect are found in Morocco and Tunisia.

Morocco

The Moroccan code clearly says:[10]

> "Anything that may be the subject of legal obligation may form the *mahr*..."

Tunisia

The Tunisian code is more illustrative on the point saying:[11]

> "Anything which is lawful and has a monetary value may form the *mahr*, it cannot be a valueless thing..."

These statues conform to the established norms of the *Shariah;* but, about the traditional controversy that whether the personal serv-

ices of a husband can constitute *mahr* or not, the modern statues are not expressly clear. It, however, appears that the husband's personal services for a determinate period can form a valid subject of *mahr*. Teaching of the Quran or providing any other educational facility to the wife can also, under these statutes, be treated as a valid subject of *mahr*.

4. Quantum of *Mahr*

The parties to a marriage are, under *Shariah* free to determine the quantum of *mahr* themselves by mutual consent. There is no hard and fast rule about it. However, the Hanifis insist on a legal minimum of ten *dirhams* (equivalent to 2.97 grammes of silver). The Shafi'is donot insist upon the legal minimum but recommend it. As regards the maximum *mahr*, none of the schools of Islamic law prescribes any limit. Whatever is agreed upon (howsoever high), is payable.[12] The position under the statutory laws in Muslim Countries is diverse. Some countries have in this respect followed the traditional principles while as others have shown a clear deviation from those norms.

Morocco

Regarding quantum of *mahr*, the Moroccan code has adopted the principle of complete freedom of stipulation. It envisages as follows:[13]

> "..... there is no maximum or minimum thereof".

Lebanon

The Ottoman Law as applied in Lebanon, provides:[14]

> "..... any amount may be specified as *mahr*".

Tunisia

With respect to the minimum *mahr* the language of the Tunisian code is more guarded than the Moroccan and Lebanese statute. It reads as follows:[15]

> "..... it cannot be a valueless thing, nor is its maximum limited..."

Yemen

In the former state of South Yemen deviating from the classical law, an upper limit of *mahr* has been fixed. The family law of Yemen(S), 1974 provides:[16]

> "The *mahr* inclusive of both prompt and deferred parts shall not exceed one hundred *dinars*".

Somalia

In Somalia, the Family Code, 1975 has also provided upper ceiling of *mahr*. It says:[17]

> "The bride shall be entitled to *mahr* as determined at the time of marriage. The upper limit for *mahr* is SO SH 1000 or its value in kind".

In principle the wife's right to *mahr* in *Shariah* is protected by Somalian enactment. It, however, includes two such innovations which make this right a mere token. It is provided that it must be fixed at the time of marriage leaving no room for *mahr-al-mithl* and there will be an upper ceiling of one thousand Somali shillings (or its equivalent in kind) on *mahr*.[18] This ridiculous ceiling (SO SH 1000 = £80, i.e., 1500 IR) defeats the very purpose of *mahr* under the socio-legal strategy of Islam.[19]

5. Specified and 'Proper' *mahr*

Mahr, with respect to a marriage, may be fixed by the parties before, at the time of, or after the marriage. Such *mahr* is called as *mahr-al-musamma* (specified *mahr*). When the *mahr* is not so specified by the parties to a marriage, a proper amount becomes payable to the wife as *mahr*. This is called as *mahr-al-mithl* (*mahr* of the like or 'proper *mahr*'), which is determined with reference to the *mahr* of the other women in the wife's father's family and her personal qualities like age, beauty, virginity, education, character, social status, etc. The choice between the specified *mahr* and the proper *mahr* has generally been retained by the modern legislations in Muslim countries.

Iraq

The Iraqi Code of personal status 1959-84 provides:[20]

> "A woman is entitled to the *mahr* specified in the contract, if it has not been specified she shall get the proper *mahr* (*mahr al mithl*)".

Lebanon

The relevant provisions of the Ottoman law read as follows:[21]

> "*Mahr* can either be specified (*mahr al musamma*) or it may be proper *mahr* (*mahr al mithl*). Proper *mahr* in respect of the women shall be that of her equals on her paternal side, and if there is no such person it shall be equal to that of the women of her status in her town ..."

Somalia

Contrary to above, the Somalian Code does not approve of the choice between proper and specified *mahr*. It says:

> "The bride shall be entitled to *mahr* as determined at the time of marriage ..."

Sudan and Egypt

In case of certain disputes about quantum of *mahr* the enactments of Sudan and Egypt make proper *mahr* payable to the wife[23].

6. Bride's consent to *mahr*

The woman, under Islamic law has a right to accept or reject an offer of marriage. She similarly, has as a right to agree or refuse certain terms and conditions to the marriage put forward by the other side. Thus, she may not agree to a certain amount of *mahr*. Some modern statutes have taken note of bride's consent as an essential for *mahr* fixation.

Sudan

The Sudanese Law on Marriage and Guardianship, 1960, provides as follows:[24]

> The consent and approval of a girl who has attained puberty is essential for the choice of her husband as well as for the amount of *mahr*.

It further declares:[25]

> Silence of a virgin on the choice of the bridegroom and the amount of *mahr* shall amount to her consent and her assertion that she did not know that silence would mean consent shall not be accepted unless she is mentally weak.

Morocco

The Moroccan Code, though with a different purpose, accepts the bride's consent as an essential for *mahr* fixation. It says:[26]

> Where a legally major girl agrees to *mahr* which is less than her proper *mahr* (*mahr al mithl*) her guardian can not object to it.

So it is generally accepted that the bride's consent is essential for *mahr* fixation. It may, however, be pointed out that the rule, that a bride can accept *mahr* which is less than her proper *mahr* against the wishes of the guardian, is subject to serious doubt. Such acceptance of lower *mahr*, can affect the rights of the other women in the family of the bride which the guardian may ordinarily not allow.

7. Disputes about *mahr* amount

About the proof of *mahr*, the *nikahnamas*, *kabinnamas*, and the oral statements have been the main sources of evidence. Where no proof is available about the amount of *mahr*, whether the wife will be entitled to proper *mahr* or any other amount is not expressly clear from the classical authorities. Now the modern legislations appear to have tried to evolve some principle in this respect.

Egypt

The relevant provision in the Egyptian Law on Personal Status, 1929-85 reads as follow:[27]

> If there is a dispute between the spouses regarding the amount of *mahr*, the wife shall be asked to prove her claim. If she fails to do so, the

statement on oath made by the husband shall be accepted unless he states an amount which cannot be normally supposed to be the *mahr* of the women of her status, in which case the proper *mahr* of the wife shall be binding on him. Same rule shall apply where parties to the dispute relating to *mahr* are one of the spouses and the heirs of the other or the heirs of both the spouses.

Sudan

The Sudanese Law on Talaq, Marital Disputes and Gifts 1935 provides as follows:[28]

> Where there is a dispute regarding the amount of *mahr*, unless the wife can prove, otherwise, the husbands's statement on oath shall be accepted, but if he states an amount which cannot normally form the *mahr* of a woman of the wife's status the proper *mahr* shall be binding on him.

Lebanon

The relevant Ottoman Law provides:[29]

> Where there is a dispute as to the specification of *mahr* and its amount cannot be established, the proper *mahr* shall be payable. If the spouse who claims that it was specified is the wife, the proper *mahr* so payable shall not exceed the amount claimed by her, but if that spouse is the husband, the proper *mahr* shall not be less than the amount claimed by him to have been specified.

It further says:[30]

> "where the amount of specified *mahr* is disputed and the husband claims it to be an amount which is customary, his word shall be accepted."

About these provisions it has been pointed out by some writers that "on this point, Qadi Abu Yusuf's simple view has been enforced in supersession of other Hanafi opinions"[31]. A-side of it, a clear reading of these provisions shows that where actual amount of specified *mahr* cannot, after the statements of husband and wife, be proved, proper *mahr* will be due to the wife. This is fair.

Jordan

As a matter of fact the proper maintenance of *nikahnamas*, *kabinnamas* and marriage registers can help in avoiding disputes about the quantum of *mahr* and other related matters. The Jordanian code of Personal Status, 1976 has made such maintenance of records compulsory in following words:[32]

> "A dispute concerning *mahr* shall not be entertained if the claim made in this respect is different from the entry in the certificate of marriage or is not provided by written evidence".

Syria

The Syrian Law has taken a fair note of another important situation: where the stipulated *mahr* may be claimed to be fictitious or fraudulent. In article 54(iv) it provides:

> "Where it is claimed that the stipulated *mahr* is fictitious or fraudulent, either party can prove it. If the said *mahr* is not proved to be real, the judge shall enforce proper *mahr*."

8. Increase or decrease in the amount of *mahr*

The traditional law allows increase and decrease in *mahr* by the husband and wife respectively, at any time during the marriage. The Shafi'is treat addition in *mahr* as *hiba* and, therefore, needs for its validity the delivery of possession. The Hanafis and Shias on the other hand, treat it as a condition that becomes incorporated in the original agreement. Though in a single country, this aspect of *mahr* has also come under modern legislation.

Syria

The Syrian code of Personal Status, 1953 incorporates the following provisions in this respect:[33]

> "Increase or decrease in the amount of *mahr*, whether during the subsistence of marriage or during *iddah*, shall be void if not made in the court where this is done by mutual consent, the action must be duly registered with the *qadi*."

The provisions prescribe the following requirements for the validity of any increase or decrease in the amount of *mahr*:

a) Increase or decrease in the amount of *mahr* must take place with mutual consent of the parties to the marriage.
b) Such an increase or decrease must take place in the court.
c) Such an action must be duly registered with the *qadi*.

It is evident that in Syria any increase or decrease in *mahr* can validly be made only when these statutory requirements are followed. It also implies that the relinquishment of *mahr* by the wife cannot be effective unless it takes place in conformity with the said provisions.

9. Time for payment of *mahr*

The basic spirit of *mahr* demands that the husband must be very prompt in presenting it to the wife. However, for sufficient reasons the payment of *mahr* may be deferred with the free consent of the wife. In this respect the jurists have developed following optional propositions for adoption by the parties:

a) The whole *mahr* may be made payable at the time of marriage, soon, thereafter or on demand (*indat-talb*). Such *mahr* is called *mahr al-mu'ajjal* (prompt *mahr*).

b) The whole *mahr* may be made payable on the happening of a specified event (e.g., death, divorce or a specified period of time). Such *mahr* is called *mahr ghayr mu'ajjal* (deferred *mahr*).

c) A specified portion of *mahr* may be made payable as in (a) and the rest as in (b).

In this respect the Ottoman Law provides:[34]

> "The specified *mahr* may be made either prompt (*mu'ajjal*) or deferred (*muw'ajjal*) wholly or partly".

Where no time is specified for the payment of *mahr* or where its nature is described only in general terms and it is not clear as to how much of *mahr* is *mu'ajjal* and how much *ghayr mu'ajjal*, such *mahr* is known as *mahr ghayr muqatta*. In such cases under Shia law the whole *mahr* is treated as *mu'ajjal*, while as under Hanafi law the portion of *mahr* to be *mu'ajjal* is determined with regard to the personal qualities of the wife, the quantum of *mahr* fixed and *'urf* (custom). The position under modern statues in Muslim countries is given below.

Pakistan and Bangladesh

> "Where no details about the mode of payment of *mahr* are specified in the *nikahnama* or the marriage contract, the entire amount of *mahr* shall be presumed to be payable on demand, that is prompt"[35]

This rule of presumption, as pointed out by Professor Mahmood, is supported by the Ithna Ashari School of Islamic Law.[31]

Iraq

(1) "*Mahr* may be made either prompt or deferred, wholly or in part; where no specific provision is made, custom shall prevail."

(2) "The period fixed in the marital contract for the entitlement of the deferred *mahr* shall lapse on death or divorce."[37]

Jordan

> It is lawful to make the *mahr* prompt or deferred, the whole or part of it as specified in the certificate of marriage, when it is not so specified to be deferred, it shall be regarded as prompt.[38]

Somalia

The Somalian Statute, referred to above, prescribing an upper ceiling for *mahr* at one thousand Somali shillings, has also an impact on the time for payment of *mahr*. Professor Tahir Mahmood comments on this as follows:[39]

> "It also makes quite meaningless the Somali statutory protection of the traditional rules relating to choice between prompt' and 'deferred' *mahr*, the wife's right of remitting *mahr* and the amount of *mahr* payable in the cases of marriage dissolved before consummation."

10. Enforcement of *mahr*:

(a) Prompt *mahr*

The classical works on *fiqh* contain rules about the enforcement of *mahr* prescribing measures for making the husband to discharge this duty towards the wife. According to these authorities, the wife has a right to deny her person to the husband until she receives her prompt *mahr*. But the question that whether the wife can exercise this specific right for non-payment of prompt *mahr* even after the consummation of the marriage is not finally settled by the traditional authorities. Imam Abu Hanifa has replied this query in affirmative but according to the disciples (Imam Abu Yusuf and Imam Mahammad Shaybani) the wife continues to hold such right after consummation only if the cohabitation with her has taken place under compulsion or she is an infant or insane. The controversy can now be settled by statutes at different places. The present statutory position in some Muslim countries is as given below.

Jordan

> "Where the wife has received her *mahr*, or where the parties have agreed to defer the payment of *mahr* for a stipulated period, the wife cannot refuse consummation of a marriage.[40]"

This shows that in Jordan before the payment of prompt *mahr* the wife can refuse consummation of the marriage but she cannot do so after having received her *mahr* or where payment of *mahr* has been deferred for a stipulated period. It, however, appears that where the *mahr* has been deferred for an indeterminate period of time the wife shall have a right to refuse consummation of her marriage so long it remains unsatisfied or some specific agreement is reached between the parties.

Now where the marriage has been consummated before the payment of *mahr* or before any stipulation about time having been set between the parties, the wife can be held entitled to refuse society to the husband for non-payment of *mahr* after such consummation of marriage. About the refusal of her society to the husband the Jordanian code provides in unqualified terms[41]:

> ".... she will have the right to refuse to join him if he has not paid her prompt *mahr*".

About the wife who has received her prompt *mahr* the Code clearly lays down:[42]

> A wife having been paid her prompt *mahr* shall obey her husband and live in his house and go with him wherever he goes even if out of the country, provided that her safety is assured and no condition to the contrary has been registered in the certificate of marriage. Where she refuses to obey him, her right to maintenance will lapse.

The Jordanian law gives an additional right to the wife to claim dissolution of marriage on account of non-payment of prompt *mahr*, provided her marriage is still unconsummated. It provides[43]:

> Where a marriage has not been consummated and the husband is unable to pay the prompt *mahr*, the wife can bring an action for the dissolution of the marriage. The *qadi* shall thereupon give one month's time to the husband and if he fails to pay it within that period, the marriage may be dissolved. If in such a case the husband is absent, or if his whereabouts are not known, or if he has no property in the place, the marriage may be dissolved forthwith.

Syria

The Syrian Code makes it incumbent upon the wife to live with her husband after receiving her prompt *mahr*. It envisages:[44]

> "The wife must, after receiving her prompt *mahr* reside with her husband."
>
> ".... the wife shall have a right of refusal to join him if the husband has failed to pay the prompt *mahr*...."

This leads to the inference that the wife can refuse to live with the husband for non-payment of prompt *mahr*. There is nothing, in this provision, to show that the wife cannot do so after the consummation of marriage. The Syrian Code has made clear a very important point that:[45]

> "The law of set-off shall not apply to prompt *mahr* even if permitted by the wife"

Lebanon

The Ottoman Law provides:[46]

> "The wife is bound, after receiving her prompt *mahr* to reside in the house of her husband and to travel with him if he wants to shift to another town, unless there is any legal obstacle."

In effect the provision is similar to that in Syrian Code.

Tunisia

The relevant Tunisian statute provides:[47]

> "The husband cannot unless he pays the *mahr* force the wife to consummate the marriage. After a marriage is consummated, *mahr* shall constitute an unsecured debt of which only the wife can claim payment."

It is clear from this provision that in Tunisia the woman cannot be compelled by the husband to consummate the marriage before the payment of *mahr*. In other words, the wife. under this statue, can refuse her person to the husband for non-payment of *mahr*.

Morocco

The Moroccan code contains a complex provision about the enforcement of *mahr* which reads as follows[48]:

> "Where there is a dispute between the spouses as to the payment of *mahr* the wife's claim shall be accepted if the dispute arises before consummation of marriage. But if it arises after that, the husband's statement shall be accepted."

The provision, among other things, implies that the wife can refuse consummation of marriage on account of her demand for *mahr* from the husband only before submitting herself to him.

Iraq

Iraqi Code not only justifies that wife's refusal of the society to the husband for no-payment of prompt *mahr* but also protects her right to maintenance during this period. It says[49]:

> "(1) Maintenance of wife is obligatory on the husband .... even if she is living with her parents, except when the husband wants her to come to his house and she refuses to do so without any excuse.
>
> (2) The wife's refusal shall be valid if the husband has withheld her prompt *mahr* ..."

b) Deferred *mahr*

Deferred *mahr* can be enforced just after the expiry of the stipulated period of time (if any) or on the happening of a certain event specified for the purpose. Where the payment of *mahr* has been deferred without any mention of a specified period or event, it can be claimed on the dissolution of marriage, either by the act of the parties or by death. However, Imam Abu Yusuf has opined that where *mahr* has been deferred for an indeterminate period, the wife can claim its payment immediately an demand, provided the marriage has not already been consummated. A situation may arise where the payment of *mahr* has been deferred for a specified period of time or upto the happening of a specified event (other than marriage dissolution) but the dissolution of marriage takes place before the expiry of such time period, it appears, that the *mahr* will become, enforceable just after such marriage dissolution. Provisions are found in this respect in Iraqi Code and Ottoman Law. The Iraqi Code declares:[50]

> "The period fixed in the marital contract for entitlement to the deferred *mahr* shall lapse on death or divorce."

Lebanon.

The position under the Ottoman Law has been that the condition of time for the payment of deferred *mahr* lapses only on the death of the husband and not on divorce. But where no determinate period has been fixed for deferred *mahr*, it can be enforced on the death of either party or divorce. The Ottoman Law provides[51]:

> "Where the period for the payment of deferred *mahr* has been fixed, the wife cannot claim its payment before that time even if a divorce takes place; but if the husband dies the period so stipulated lapses. If no period is specified for the payment of the deferred *mahr*, it shall be deemed to be deferred till the occurrence of the death of either party or divorce."

Pakistan and Bangladesh

The family laws Ordinance, 1961 applicable in these countries makes in its Section 6(5) (a) *mahr* immediately payable if the husband takes another wife without prior permission. The section reads as:

> "Any man who contracts another marriage without the permission of the Arbitration Council shall -
>
> a) Pay immediately the entire amount of *mahr* whether prompt or deferred, due to existing wife or wives, which amount if not paid shall be recovered as arrears of land revenue."

11. *Mahr* and irregular (*fasid*) marriages

For an unconsummated irregular marriage, no *mahr* is due to the wife. However, on its consummation the specified or proper *mahr*, whichever is less, becomes payable to her. "Presumptive consummation" (*Khalwat-e-Sahih*), recognized by Hanafi, Maliki and Hanbali laws is for the purpose of *mahr*, not equated with actual consummation. Thus, in cases of irregular marriages the wife becomes entitled to *mahr* only after actual consummation. Provisions are found in this respect in some enactments also.

Syria

The Syrian Code recognizes the above principle in following terms[52]:

(1) An irregular marriage if not consummated shall be like a void marriage,
(2) If it is consummated it shall give rise to:

a) the proper or the specified *mahr* whichever is less.

Iraq

The Iraqi Code provides as follow:[53]

Where separation takes place after consummation of an invalid marriage, the specified *mahr* or the proper *mahr*, whichever is less, shall be binding; where no *mahr* has been specified in such a case, the proper *mahr* shall be payable.

Lebanon

The Ottoman Law contains detailed provisions about the matter. The full text of these provisions is as given below[54]:

> "A void marriage whether consummated or not, and an irregular marriage if not consummated, shall have no legal effects of a valid marriage; on the basis of any such marriage the parties shall have no rights and obligations of a valid marriage, e.g., *mahr*, paternity, *iddat*, bar of affinity and mutual inheritance."
>
> "If an irregular marriage is consummated, it shall give rise to the rights of *mahr*, *iddat*, paternity and bar of affinity, but it shall not establish the rights of maintenance and mutual inheritance."

The Ottoman Law, therefore, makes the position of *mahr* clear both in irregular as well as in void marriages. It further provides in specific terms that:[55]

> where separation takes place after consummation of a marriage which is irregular and the *mahr* had been specified, such *mahr* or the proper *mahr* whichever is less shall be payable; where, in such a case, *mahr* had not been specified or had been incorrectly specified, the proper *mahr* shall be binding, if separation takes place before such a marriage is consummated, nothing shall be payable as *mahr*.

12. *Mahr* and marriage consummation

The right to the entirety of *mahr* vests in the wife only when the marriage has been consummated[56] or when either of the parties to a subsisting marriage dies before consummation. Now where dissolution of marriage takes place before the consummation of marriage the extent of the wife's entitlement to *mahr*, according to the Quran, will depend upon the fact whether the *mahr* was fixed or not. It provides that where a women has been divorced before the consummation of marriage and without fixation of *mahr*, no *mahr* is payable to her, but a 'gift' or 'present' called *mata'*, which under Hanafi law cannot be more than half of *mahr* is due to her. On the other hand, where the woman has been divorced before consummation of marriage but after

the fixation of *mahr*, she will be entitled to half of it. However, the wife may freely remit her half of the *mahr* also, or the husband may pay full *mahr* to the wife.[57] The modern legislations have embodied certain rules about the matter.

Lebanon

The Ottoman Law provides:[58]

> Where the *mahr* has, in a valid marriage been specified, its payment in full becomes binding on the death of either spouse or on divorce after valid retirement (*Khalwat al Sahih*). If a divorce occurs before such retirement, half of the specified *mahr* shall be payable, where separation takes place on the initiative of the wife, e.g., where her guardian claims dissolution of the marriage on the grounds of inequality of the husband, the *mahr* shall lapse in full where no *mahr* is specified in a valid marriage contract or is specified but the specification is incorrect, the proper *mahr* shall be payable on the death of either spouse or on the occurrence of divorce after 'valid retirement'; when a divorce occurs, in such a case, before valid retirement a *mata'* (consolatory gift) shall be payable. The amount of *mata'* shall be determined in accordance with custom and usage but it shall not exceed half of *mahr*.

The rule about *mata'* in this provision conforms to the Hanafi view of the Law.

Jordan

The Jordanian Code embodies the rule in following terms:[59]

> Where divorce takes place before *mahr* is stipulated or before consummation of marriage or presumptive consummation, *mata'* will be obligatory; and *mata'* will be fixed up in accordance with custom and usage and in conformity with the husband's position but shall not exceed half of proper *mahr*.

Iraq

The relevant provision in Iraqi Code reads as follows:[60]

> "The wife is entitled to the whole of the specified *mahr* after the marriage is consummated or after either spouse has died. In case of divorce before consummation, half of the *mahr* is payable."

Morocco

The position under Morrocan Code will be as follows:[61]

> A husband who, on his initiative, divorces his wife shall give her a *mata'* in accordance with his financial conditions and the status of the wife. No such gift is necessary when *mahr* is specified but the wife is divorced before consummation of marriage.

13. *Mahr* as damages for breach of betrothal

In Brunei Darussalam *mahr* (locally called *mas-kahwin*) has been connected with the payment of damages for breach of promise to marry. The relevant provision of the Brunei enactment reads as follows[62]:

> "If any person shall, either orally or in writing and either personally or through an intermediary, have entered into contract of betrothal in accordance with Muslim Law and subsequently refuses without lawful reason to marry the other party being willing to perform the same, the party in default shall be liable, if a male, to pay as damages the amount of the *mas-kahwin* which would have been payable together with other monies extended in good faith in preparation for the marriage, of if a female, to return the betrothal gifts, if any, or the value thereof and to pay as damages the amount of such other monies as aforesaid; and the same may be recovered by action in the Court.

14. Return of *mahr*

The Iraqi code incorporates provisions about the return of *mahr* on the failure of betrothal. It provides:[63]

> "If the man had given to the fiancee, before the marriage, any property on account of *mahr*, and either party failed to contract the marriage or died, what was so given shall be returned if intact; where such property has been lost possession of, its value shall be recoverable."

Family Law of 1978, in the former state of North Yemen contains following provisions in this respect:[64]

> Engagement or promise to marry or acceptance of *mahr* or gift etc., shall not constitute marriage and either party can go out of it. Where

the man cancels the engagement he can withdraw the *mahr* or its value, while if the woman has broken the engagement she must return the gifts presented to her.

15. *Mahr* and equality of spouses (*Kufu*)

Doctrine of *Kufu*, which intends that the parties to a marriage must be equal for ensuring harmonious life to the spouses after marriage, was developed by some Muslim jurists. Now also, the modern legislation in some Muslim countries has connected *mahr* with this doctrine.

Lebanon

"... Equality in wealth means that the husband shall be capable of paying the prompt *mahr* (*mahr al mithl*) and meeting the maintenance expenses of the wife",[65]

"Where a major girl denies that she has a guardian and marries a person, if it appears that she married an 'equal' the marriage shall be binding even if the *mahr* is less than her proper *mahr*. But if she has married a person who is not her 'equal', her guardian may approach the court and the marriage may be dissolved".[66]

Morocco

"Where the guardian neglects to contract the ward into marriage, the *qadi* shall ask him to do so and if he refuses to do so the *qadi* himself can give her in marriage to a person who is her 'equal', with proper *mahr*[67]"

16. *Mahr* and *Khul'*

Khul' is the termination of the marriage bond on the request of the wife for some *iwaz*. It is not necessary that the *iwaz* must be the *mahr* itself. It can be any property (monetary or non-monetary) equivalent to or more or less than *mahr*. But usually the wives give up their *mahr* as *iwaz* for *khul'*. Relevant provisions are found in the enactments of Iraq and Algeria.

Iraq

Iraqi code in this respect provides:[68]

"A husband can agree to *khul'* in consideration of an amount less or more than *mahr*".

Algeria

The Algerian Family Code, 1984 provides differently as follows[69]:

"The wife can get separation from the husband by *khul'* under an agreement on the same. In case of disagreement, the *qadi* may pass a decree of *khul'* for a consideration to be given by the wife not exceeding the value of her *mahr*."

Lebanon

Section 130 of the Ottoman Law, in effect, deprives a divorced wife of her *mahr* or makes her return not more than half of her *mahr* (if already paid), if the wife is responsible for the breakdown. It provides:

"... where no reconciliation is possible and fault is of the husband, divorce shall be granted. Where the fault is of the wife, a *khul'* may be granted in consideration of the whole or part of *mahr*...".

Syria

According to Article 98 of the Syrian Code, where consideration has been fixed for *khul'*, which is something other than *mahr*, this consideration is binding and both parties are also released from any obligation regarding *mahr* or maintenance. And as per article 99 where the parties do not name any consideration, the *khul'* shall take effect and both parties shall be released from the rights of the other regarding *mahr* and maintenance[70]. In both these situations the wife shall have to forgo her *mahr*.

17. *Mahr* and *Faskh*

In cases of *faskh* (judicial divorce) the divorced women's entitlement to *mahr* in various Muslim countries will, among other things,

depend upon the provisions in their respective enactments given below.

Pakistan and Bangladesh

The Dissolution of Muslim Marriages Act, 1939 applicable both in Pakistan and Bangladesh protects the divorced woman's right to *mahr*, in following terms:[71]

> "Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her *mahr* or any part thereof on the dissolution of her marriage."

Other Countries

The position of women's *mahr* on *faskh* in other Muslim countries, is as follows:[72]

i) in all cases where *mahr* is not specified but is, otherwise, payable proper *mahr* shall be payable in all countries.

ii) where the divorced wife claims a higher amount to have been specified as her *mahr* but cannot prove it, while the husband quotes an amount as specified *mahr* which seems unusually low, proper *mahr* shall be payable in Egypt, Jordan, Lebanon and Syria.

iii) where an unconsummated marriage is dissolved on the grounds of impotency or sexual deformity of either party, no *mahr* is payable in Jordan and Syria.

iv) where an unconsummated marriage is dissolved while *mahr* is specified, half of it will be payable in Iraq, Jordan and Syria.

v) where a marriage is dissolved on account of the wife's apostary, no *mahr* will be payable in Jordan.

One more situation envisaged by the Ottoman Law is the marriage during death-illiness. About the right to *mahr* in such cases, it provides:[73]

> If a person marries during his death illness and it appears that the specified *mahr* in such a marriage is equal to the proper *mahr* of the wife, she will get it from the property left by the husband; but if the *mahr* so specified exceeds the amount of the proper *mahr*, the excess shall be governed by the law of bequests.

The law about *faskh* and *mahr*, in Libya is as given below:[74]

> "If the husband has claimed separation and his allegation is proved, the court shall ask him to pronounce a divorce, and if he refuses to do so the court shall decree a divorce. In either case the court shall order lapse of deferred *mahr*, maintenance of *iddat* and accumulated past maintenance. If the allegation has not been proved, the court shall dismiss the suit.

The Syrian enactment, in its article 54 grants better protection to the women about *mahr*. The relevant clauses (iii) and (iv) read as follows:

> "*mahr* shall be treated as a preferential debt...."
>
> "Every *mahr* debt stipulated in the deed of marriage or divorce shall be regarded as a secured debt....Deferred *mahr* shall be payable before the expiry of *iddat*".

18. Procedure for payment of *mahr*

In Malaysia procedure been laid down about the payment of *mahr* (locally called *mas-kahwin*) and also about making customary payments in addition to *mahr*, called *pemberian*. The said procedure is as follows:[75]

(1) The *mas-kahwin* shall ordinarily be paid by the man or his representative to the woman or her representative in the presence of the person solemnizing the marriage and at least two other witnesses.

(2) The registrar shall, in respect of every marriage to be registered by him, ascertain and record:

(a) the value and other particulars of the *mas-kahwin*.
(b) the value and other particular of any *pemberian*;

(c) the value and other particulars of any part of *mas-kahwin* or *pemberian* or both that was promised but not paid at the time of the solemnization of the marriage and the promised date of payment; and

(d) the particulars of any security given for the payment of any *mas-kahwin* or *pemberian*.

Syria

The Syrian Code also contains a procedural provision as follows:[78]

> "*Mahr* is wife's right and the husband shall not be absolved of his liability except by its payment to her personally if she has full legal capacity — unless the contract of marriage names a particular representative to take possession.
>
> The law of set-off shall not apply to prompt *mahr* even if permitted by the wife."

19. *Mahr* and anti-dowry legislations

Dowry is confused by some with *mahr* because of its being rendered into English as dower. The anti-dowry legislations in Bangladesh and Pakistan make this distinction clear and protect *mahr* from any impact thereof.

Pakistan

In Pakistan, the Dowry and Bridal Gifts (Restriction) Act, 1976 while defining bridal gift, excludes *mahr* from its purview as follows:[77]

> "Bridal gift means any property given as a gift before, at or after the marriage, either directly or indirectly, by the bridegroom or his parents to the bride in connection with the marriage but does not include *mahr*".

Bangladesh

In Bangladesh also, the Dowry Prohibition Act, 1980 excludes *mahr* from its application. While defining dowry it provides:[78]

> "Dowry means any property or valuable security given or agreed to be given either directly or indirectly;
>
> a) by one party to a marriage to the other party to the marriage; or
>
> b) by the parents of either party to a marriage or by any other person to either party to the marriage or to any other person, at the time of marriage or at any time or before or after the marriage as a consideration for the marriage of the said parties, but does not include dower or *mahr* in case of persons to whom the Muslim Personal Law (*Shariat*) applies.

The law on *mahr* is thus protected by these legislations in these countries.

III. Conclusion: Inferences and Opinions

The legislation about *mahr* that has taken place in many Muslim countries is largely appreciable. Mostly this is an embodiment of the established principles of *Sharaih*. There are many good points in it. The definition of *mahr* given by the Moroccan enactment, is clear and true to its spirit. This effort is more admirable than that of many traditional authors, text-book writers and judges. The statutory recognition of the bride's consent as an essential requirement for fixation of *mahr* coupled with the express declaration of *mahr* as exclusive property of the wife is a welcome step taken by some Muslim countries towards ensuring 'Islamic gendre-justice '. Encouraging is the effort of certain countries to evolve principles about the settlement of disputes related to quantum of *mahr* and its enforcement, though to attain certainty in this respect, some further attempt is needed. The laying down of procedures for payment of *mahr*, its increase or decrease and maintenance of records, is an appropriate legislative action which can after further improvements, streamline the working of the institution of *mahr* in Muslim society. Moreover, the statutes which connect *mahr* with damages for breach of betrothal is a good addition to family penal laws. These merits aside, the legislative prescription of a ridiculous upper ceiling of *mahr* in Somilia and the former state of South Yemen is a deviation from the established norms of *Shariah*. Such deviations, substantially affecting the rights of woman, need to be avoided. The 'widow's right of retention', an important aspect of law of *mahr* has yet not been brought under legislation.

With the above enumerations and inferences a word needs to be add about the place of modern legislation (as a tool of social justice) in *Sharaiah*. Islam described by the Quran as *al-Din* (the only eternal and universal order) envisages the fundamental principles of law and justice coupled with obligatory illustrative formulations, available in the Quran and *Hadith* (i.e. 'The Revelation', direct and indirect). These principles, being universal are claimed to be multi dimensional and being eternal are claimed to be suited to all times to come. Their potential to regulate human conduct is, of course, large and efficient. But in view of the continuity of the Creation (commonly called as historical process, development, progress or change etc.) at the hands of the Creator (Allah), a continuous process of 'law identification and deduction ' with an absolute nexus with these revealed principles is needed. This Islamic process of 'law identification and deduction', must be well differentiated from modern 'law- making'. In its nature , it is more similar to the modern process of delegated legislation rather than legislation. Its purpose is as to fill the gaps of time and space in the Islamic judicial system.

Seen from the practical point of view, there are enormous juristic formulations and precedents available in Islamic *juris corpus (fiqh)* which offer sufficient choice for picking up suitable norms after a proper apprehension of varying situations. The task of the jurists is to take a note of the existing circumstances and give a better choice of suitable regulations from the said body of *fiqh* about various matters. If necessary a new approvable rule can be found out. This, however, needs to be made clear that the said task of law identification and deduction may not necessarily be given in the hands of the modern state legislatures. It can be better performed by the qualified Muslim scholars, but under a common umbrella. This, in fact, is not a process of ordinary reformation. Characterized by *Ita'at* (obedience to Allah) *tahqiq* (investigation) and *takhayyar* (eclectic choice) the said process is purely an Islamic process. It is a choice of suitability from the prescribed and approvable rules of *Shariah*.

In modern times the success of this process will depend upon the following measures:

a) Care is taken that those who have devoted their lives for the study of Islamic law, and are well versed with the features of historical process in general and the present day trends in particular, are not ignored.

b) The institution of *qadis* manned with honest and qualified persons is established.

c) The modern facility of publishing the statutes, decisions and academic opinions is fully utilized.

Without such a measure, we submit, that it will not be possible to translate the 'revelation' into legislation.

References

1. Here we attempt a comparative analysis of these staturoty provisions and the classical principles.
2. Article 16
3. *Quran*, IV:4
4. Basically the Ottoman Law on Family Rights, 1917 has been adopted in Lebanon and is applicable to the Muslims in Israel also.
5. Article 89
6. Article 18
7. Article 19
8. Article 12
9. Tahir Mahmood, *The Muslim Law of India*, P. 72 (*Allahabad*, 1980).
10. Article 17
11. Article 12
12. Supra note 9 at p. 73
13. Article 17
14. Article 80
15. Article 12
16. Article 18
17. Article 24
18. II Islamic CLQ, 250, 255 (1982)
19. Ibid
20. Article 19(1)
21. Article 80
22. Article 24
23. See below in this Chapter '*Disputes about mahr*'
24. Article 6(a)
25. Article 6(c)
26. Article 23

27. Article 19
28. Article 10
29. Article 86
30. Article 87
31. i) Tahir Mahmood, *Family Law Reform in Muslim World*, P. 39 (ILI, 1972);
    ii) Tahir Mahmood, *Personal Law in Islamic Countries*, (ALR, New Delhi, 1987);
    iii) Anderson "Recent Developments in *Sharaih* law". 42 Muslim World (1952), 187.
32. Article 51
33. Article 57
34. Article 81
35. Section 10, Muslim Family Laws Ordinance, 1961 applicable both in Pakistan and Bangladesh which have common legal history upto 1971.
36. Supra note 31(i)
37. Article 20, Iraqi Code of Personal Status 1959-83.
38. Article 45, Jordanian Code of Personal Status, 1976.
39. Supra note 18
40. Article 43, Jordanian Law of Family Rights, 1951 (Emphasis added)
41. Article 67
42. Article 37
43. Article 55, Supra note 39
44. Article 66, 72
45. Article 60(ii)
46. Article 71
47. Article 13
48. Article 24
49. Article 23
50. Article 20(2)
51. Article 82
52. Article 51
53. Article 22
54. Article 75-76
55. Article 85
56. Actually or presumptively (under Hanafi, Maliki or Hanbali laws)
57. The Quran II: 236-237
58. Articles 83-84
59. Article 55
60. Article 21
61. Article 60
62. Article 136, Religious Council State Khathis and Courts Enactment, 1955
63. Article 19(2)
64. Article 2

65. Article 45
66. Article 47, Ibid
67. Article 13
68. Article 46(3)
69. Article 54
70. Norman Anderson, *Law Reform in the Muslim World*, P. 136 (1976)
71. Section 5. Same provision is applicable in India also as these three countries share their legal history upto 1947. A detailed analysis of the impact of this provision on *mahr* can be found in XIII ICLR 43-45 (1993).
72. Names of the countries and the relevant provisions in their respective enactment are—Egypt 1929:18; Iraq 1959:21; Jordan 1976:48-57; Lebanon 1917:82-87; Morocco 1958:24,60; Former State of Northern Yemen 1978:33-35; Somalia 1975:27; Syria 1953:59-63.
73. Article 88
74. Article 11(iv) Law on Women's Rights in Marriage and Divorce, 1972
75. Section 21,Islamic Family Law (Federal Territory) Act , 1984 (Malaysia)
76. Article 6
77. Section 2(a)
78. Section 2.

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Chapter - IX

CONCLUSION

1. Findings in perspective

The present study about the institution of *mahr* in Islamic law reveals:

(1) *Mahr* is not a mere pre-Islamic or non-Islamic concept adopted by Islam but is a Divinely ordained Islamic Institution with express directions in the Quran and manifest instructions from the practices of the Prophet (S.A.W.).

(2) The Islamic institution of *mahr* has survived through long the Muslim history as a living institution having attracted the attention of jurists in all times. This is evidenced by a study of the works on *fiqh* written in different periods of history. The jurists, however, have usually referred only to the rules and regulations related to the institution of *mahr* with no reference to its philosophy and purpose which is a tragic part of the matter. No serious study has been made about the exploration of the real meaning of *mahr* and its utility.

(3) With the advancement of history the institution of *mahr* with its inherent qualities and tendencies is showing greater importance as a pivotal concept of Islamic family laws and as an essential element of the Quranic social policy—'maximum spousal cohesion through voluntary measures.'

(4) Firm family system is a peculiarity of the Muslim society. Basically *mahr* serves as a key-stone of the arch on which a Muslim home rests. *Mahr* is not a coercive measure but a civilized way of winning and reposing trust reciprocally with a friendly gesture like presenting a gift to the other with open heart and smile.

(5) The basis of the institution of *mahr* lies in the Quran and *ahadith*, but while legislating and decision making on the subject reference has not always been made to these basic sources of Islamic law. Even the Quranic terminology has been ignored. The non-use of Quranic phraseology about *mahr* in its Divine perspective has let the door open for many misconceptions which are obvious from many writings about *mahr*. The Quran uses the terms *saduqah, ajr* and *fariezah* for *mahr*, it has been wrongly rendered into English as 'dower' which in reality was only an endowment due to widows at equity in common law countries. *Mahr* is different from Roman *donatio propter nuptias*, French *dot*, Hindu *stridhan* and practices like bride-price and dowry. In Islam *mahr* is not an essential of the contract of marriage but an effect of the *nikah*. It is legally enforceable because its non- payment will mean the breach of a positive direction of the Quran and it affects the honour and interest of its object (the woman).

(6) In Islam, law and faith cannot be separated. Islamic law aims at equal spiritual and materialistic development of mankind. This is the essence of the Islamic jurisprudence. The problem is that the people with more materialistic tendencies and no Divine outlook treat even a gift as price or consideration. It is in this vein that some have, of course, not with confidence but with some hesitation described *mahr* as a consideration for coitus. To justify their stand they have ignored the spirit of Islamic jurisprudence and have resorted to what we call 'analogy scenario' --- where marriage has been compared with an ordinary contract, *mahr* with consideration and the women with ...'. This is a great insult to women. This is against the basic concept of marriage and *mahr* in Islam.

(7) The scope of analogies in Islam is limited. It cannot explain the Islamic spirit behind the rights and obligations of the husband and wife, donor and donee, parent and child, master and disciple, neighbour and neighbour, rich and poor and so on.

(8) Historically speaking the application of *Shariah* and decision making in Muslim society has been selective and on the case to case basis. We, therefore, have a rich precedent available at

hand though at certain places the local practices both approvable and disapprovable have found place in the law on *mahr*. Modern legislation in Muslim countries is to some extent proving efficient to replace the uncertain customs.

(9) Among some Islamically uneducated people *mahr* is still being paid to bride's father and is being recovered by the husband, should the marriage be terminated either from her father or from the next husband to whom she is given in remarriage.

(10) Generally the quantum of *mahr* is being fixed according to socio-economic conditions of the parties and the people of the place. Hanafis prescribe a minimum of ten *dirhams* and Malikis accept even a smaller amount probably because they inhabited in a poorer area.

(11) Fathers of brides sometimes make excessive demands of *mahr* in regard to their daughters which makes it exceedingly difficult for a young man to marry or find a suitable wife. It is sometimes being so fixed as a status symbol for the family and to prevent unilateral exercise of *talaq*.

(12) In some families a moderate *mahr* is being fixed in private and for the purposes of glorification a large amount is fixed in public and entered in the deed which is read out to the guests. Such arrangements have been recognized by Muslim jurists treating private settlements as the real contract and the public declaration as nominal. The British Indian Courts have lost sight of this principle with the result that in many instances , due to excessive fixation of *mahr*, great injustice has been occasioned to the heirs of husbands. Section 92 of the Indian Evidence Act permits to lead evidence to prove that a particular agreement was not agreement at all but, not to vary the terms of the agreement. The view that no oral evidence can be led in any case and the apparent agreement is final, is not correct.

(13) Where no *mahr* is fixed by the parties the wife is entitled to proper *mahr* to be assessed with reference to the qualities of the wife and the position of *mahr* in her parental family. Some Shias hold the view that in such cases the amount of *mahr*

should not exceed *mahr al sunnat* (500 *dirhams*). Also where in an Ithna Ashari marriage discretion is given to the wife to fix the *mahr* subsequent to the marriage, she can name any amount not exceeding *mahr al sunnat*. The rule does not seem to be sound in justice.

(14) The silence of a virgin on the fixation of the amount of *mahr* is taken as her consent. This practice leaves room for exploitation.

(15) Upper ceiling of *mahr* has been fixed by statutes in Somalia and Yemen at $1000 and 100 *dinars* respectively. This is not in conformity with *Shariah*.

(16) Any addition made to *mahr* after it has already been fixed is valid. Shafiis treat it as a gift or *hiba* and to be valid needs delivery of possession. Hanafis and Ithna Asharis view this as a term getting incorporated in the original *nikahnama* or *kabinnama* and, therefore, do not require delivery of possession as an essential for its validity.

(17) The wife has a power to remit whole or a part of *mahr* whenever she may like to do so. But under *Shariah* no incidence is available where *mahr* can be reduced by any authority without the free consent of the wife. Statutory laws, however, exist in Jammu and Kashmir, and the areas comprising the former state of Oudh under which the Courts are authorized to reduce the amount of *mahr* with reference to the financial position of the husband and the status of the wife. There is no provision about the enhancement of *mahr*. Such law is not applicable in Azad Jammu and Kashmir. We submit that to allow to reduce *mahr* to husband's possibilities will sometimes mean no *mahr* or the wife will have to forgo at least her proper *mahr*. The Oudh law has now been declared by Allahabad High Court as unconstitutional.

(18) The Quran and *Hadith* in general imply a quick discharge of *mahr*. It may remain unpaid only in exceptional situations. The practice in Muslim society, however, has been different. Usually a portion of *mahr* termed as prompt *mahr* is being made payable immediately on marriage or on demand. Another portion called deferred *mahr* is said to become payable on the happening of some specified event (death or divorce). The breaking of *mahr* into two parts has become an established practice and rules are found in the books of *fiqh* about the realization of these types of *mahr* with ancillary details.

(19) In the cases of *mahr-i-ghaiyr muqatta*, that is, where it is not specified as to how much of *mahr* is 'prompt' and how much 'deferred' reference is made to *'urf* Ithna Asharis treat the whole *mahr* as payable on demand and the same is the position under Pakistan Family Law Ordinance, 1961.

(20) A girl cannot contract her marriage for an inadequate *mahr*, but there are some practices and also statutes as one in Morocco according to which a major bride can accept lower *mahr* than proper *mahr* against the wishes of the guardian. Also under Shia law grand-father has power of abatement of the *mahr*. Proper *mahr* must be made payable in such cases so that the possible exploitation and misuse are prevented.

(21) In India, only a major wife (major under majority Act) can file a suit for *mahr* without a "next friend". As regards periods of limitation the new Act is silent about it whileas in the earlier Act three years time was prescribed from the date of demand or dissolution of marriage which may apply now under the residuary clause.

(22) Difference of opinion exists as to the fact that whether a wife can validly refuse conjugal rights to the husband for non-payment of her prompt *mahr* even after the consummation of marriage or she cannot do so. The Quranic spirit seems to be in her favour.

(23) Consummation confirms the *mahr* in full. Hanafis, Malikis and Hanbalis consider "valid retirement" (*khalwat-e-sahihah*) as equal to actual consummation where the marriage is valid and not irregular. Shafiis and Ithna Asharis differ from other schools in this respect. They donot equate "valid retirement" with actual consummation in any case.

(24) In case of a *batil* marriage no *mahr* is due to the wife because it is no marriage. However, if the marriage has been consummated the wife will get the *mahr* amount. In case of consummated irregular marriage *mahr* is payable to the wife provided it was contracted in ignorance of the bar to such marriage. She will get specified *mahr* or proper *mahr*, whichever is less.

(25) The claim to *mahr* survives the death of both or either of the spouses. This is immaterial whether the *mahr* was ascertained or unascertained. For widows a special right is found in Muslim law called the "right of retention" to retain the possession of husband's property, of which she has obtained peaceful possession, till her *mahr* is satisfied. There exists some difference of opinion about the transferability and the heritability of this right.

(26) The widow's right to claim 'interest' as compensation on the unpaid *mahr* has been upheld by the Courts. She, however, is bound to render accounts of property under her possession.

(27) Widow's right of retention is not a 'lien' or mortgage in the strict sense of the term.

(28) Divorced woman's claim to *mahr* depends upon the mode of marriage dissolution. On the dissolution of a consummated marriage the whole *mahr* becomes immediately payable to the wife. The position in cases of unconsummated marriages is not uniform. Generally no *mahr* is payable to the wife if an unconsummated marriage is dissolved by the act of the wife.

(29) When an unconsummated marriage is dissolved after the fixation of *mahr*, only half of the *mahr* is due to the wife; if *mahr* has not been fixed before dissolution no *mahr* but *mata'* is to be paid to the wife. At some places like Brunei *mahr* is being taken by the woman as damages for breaking betrothal.

(30) *Mahr* can be a valid subject of *iwaz* for *khul'*. If the parties agree to something different, as *iwaz*, the *mahr* shall remain payable as usual. In case of *mubara'a* the position of *mahr* depends upon the terms of agreement between the parties. Where the agreement is silent about that, the jurists differ in their opinions about the liability of the husband regarding *mahr*.

(31) In case of *faskh*, that is, termination of marriage by *qadi* (either on his own initiative or at the instance of the wife or a third person) the position of *mahr* is determined with reference to the rules applicable in cases of *talaq and khul'* with necessary modifications in view of the defects in spouses, consummation of marriage etc. In India the same rules will apply to the cases of *faskh* granted under the Kazimi Act. Wherever conflict of opinion is found between the schools of Islamic law, the doctrine of *takhayyur* will apply.

(32) *Mahr* is not an amount payable on divorce and is not a substitute measure for maintenance of divorcees. The impression created by the Supreme Court of India in *Bai Tahira* is , we submit, not correct. *Mahr* is payable on marriage as a token of respect and symbol of the rights of women in Islam, especially property rights. Islam has its own separate comprehensive system for maintenance of all the individuals in a family and society at large. No court or legislature is supposed to belittle the significance of *mahr* and treat it merely a substitute for maintenance. The provisions of the Muslim Women Act, 1986 relating to *mahr* need to be amended forthwith.

(33) Some confuse *mahr* with *mata'* which is a gift due to the wife on divorce. This is a Quranic concept in true tune with its directive --- "either be with them with kindness or separate from them with mercy". The differentiation between the two cannot be ignored.

2. Law on *Mahr*

How misunderstood

(1) Law on *Mahr* has not always been deduced, enforced or followed with a conscious eye on its Divine origin as a symbol of Islamic matrimonial morality and a factor for spousal cohesion. Parties to the marriage remember it more on marriage dissolution rather than on marriage solemnization.

(2) Some jurists and judges have failed to grasp the main character and basic features of the Islamic institutions like *mahr, nafaqah, mata' etc.* So they have not been able to develop suitable norms

for proper regulation and fruitful working of these institutions. They have wrongly resorted to analogies treating, for instance, *mahr* as 'consideration' for marriage This can amount to say ing that "the woman is merely a chattel, *nikah* is an ordinary contract and home not a scared place." This is quite unIslamic. Analogy has an interpretative rule in Islamic law but it cannot be stretched too far. *Mahr* in its real spirit could be better understood in terms of a 'gift-spontaneous' rather than as a 'consideration' for coitus.

(3) *Mahr*, of course is a pivotal concept with multiple dimensions and supplements the other laws of personal relationship. Unfortunately its primary purpose, however, has been ignored and is being exploited for selfish ends and more material gains. In this way *mahr* has been considered by some people with myopic eyes only a means of maintenance. This is a misunderstanding. How can a gift of honour be described as an ordinary maintenance provision for the honoured person? And how can an iron ring or teaching of few *surahas* of the Quran be termed as means of economic subsistence for the wife?. More so, when there is a separate system provided for the purpose of maintenance.

(4) *Mahr* has been considered by some as a means of preventing unilaterial exercise of the powerof *talaq* by the husband. This is evidenced by excessive amounts of *mahr* fixed in some cases where there is apprehension of marriage breakdown. For the same reason some people of Kashmir, of course, innocently, were fixing such items as *mahr* as are not available. Such items are the 'Milk of a sparrow , 'bone of a mosquito , horns of a Hangul' etc.

(5) *Mahr* is its real nature is a present to be offered on marriage. So the general trend to make *mahr* as deferred is not in full conformity with the requisite Quranic spirit. It may be so deferred but only when certain special circumstances demand that and the bride agrees to such a settlement freely. In cases of *mahr al muqatta*, that is, when it is not mentioned in *nikahnama* or *kabinnama* as to how much of *mahr* is prompt and how much deferred, the rule providing that "regarding such a matter reference be made to *'urf* needs reconsideration.

(6) In *Shariah*, a wife who has attained puberty is competent to remit her *mahr* in favour of her husband. The contrary view that remission of *mahr* by a wife who has attained puberty according to *Shariah* but not majority under the Indian Majority Act, is subject to serous doubt.

(7) The view adopted by Indian Courts and elsewhere that a wife loses her right to refuse conjugal society to the husband for non-payment of prompt *mahr* on consummation of marriage, we submit, is not correct.

(8) The specified *mahr* cannot be justly reduced to husband's possibilities as is allowed by Jammu and Kashmnir Muslim Dower Act, 1920 and Oudh Law Act, 1876, because there remains an apprehension of even forgoing the whole *mahr* or at least proper *mahr*. These legislations are not based on a fair understanding of *Shariah*. These legislations contain no provision about enhancement or fixation of proper *mahr* in appropriate cases.

(9) For the validity of 'widow's right of retention' some courts have held that the widow must have obtained possession with husband's consent or that of his heirs. This view is not correct. All what is necessary is that she must be in possession and the possession must not have been obtained by force or fraud. A widow enjoys this right under the principles of *Shariah* and not under any mutual agrement.

(10) Where a widow in possession of her deceased husband's estate is wrongfully dispossesed she must be held to have a right to recover posession, as is clear from the nature of the right itself, till she has a right to retain such possession, that is, upto the satisfaction of *mahr-debt*. To hold that the widows have such a right strictly under the provisions of Specific Relief Act only is not correct.

(11) The trend prevalent at certain places to ask for the return of *mahr*, if already paid or to deprive her of her *mahr* on the pretext that she has been responsible for marriage dissolution is not correct. Deprivation of the wives from the *matá-e-talaq* for the same reasons is also incorrect.

How misused and exploited

(1) Parents or guardians of uneducated brides receive the *mahr* of such brides themselves and use it for their own purposes.

(2) Some women succeed in fixation of higher *mahr* so that the marriage tie remains in their hands. The husbands, due to excessive *mahr*, hesitate to divorce a refractive wife but immediately agree to an offer of *khul'* for remission or return of *mahr* as *iwaz*.

(3) The husbands evade payment of *mahr*, either by making it deferred or through some other delaying tactics. The reason behind this is that if the wife dies first the husband can himself retain a considerable portion of *mahr* as her heir and the remaining part of it usually goes to his own children. Now, where the husband dies first, the widows find it difficult to realize *mahr*. Lot of litigation has taken place on this subject.

(4) The express consent of the bride is not usually being sought about the amount of *mahr* or time for its payment.

(5) The view that a wife cannot refuse society to a husband for non-payment of *mahr* after the consummation of marriage leaves room for much exploitation. The husbands usually persuade their wives, who also find themselves bound by the situation or natural urge to consummate the marriage immediately without any idea of exploitation. Those wives later cannot get their claims to proper *mahr* satisfied immediately.

(6) At places where a divorcee is being deprived of *mahr* and *mata-e-talaq* on the ground that she appears to be responsible for the dissolution of marriage the husband and his relatives make always an effort to show the wife to be so responsible. Unfortunately, even the Ottoman law of Family rights and the Moroccan Code of Personal Status also leave room for such exploitation.

(7) An element of exploitation is obivious in the Shia rule that where a woman is authorised to fix her *mahr* herself, she cannot choose any amount exceeding 500 dirhams which is *mahr al-Sunnat*.

(8) 'Urf, of coruse, is an important source of law, but uncertainity in it enoucrages wrongful assertations and injustice. It breeds exploitation. 'Urf is used at some places to deprive women from at least a part of *mahr*.

(9) Each Muslim wife has three distinct rights regarding *mahr*, *nafaqah* (maintenance) and *mata'*. To treat *mahr* as a source of maintenance is to go against the interests of a Muslim wife.

(10) Wherever the widow's right of retention is not held as transferable and/or heritable the widows are put to unfair treatment by husbands' heirs and creditors.

3. Need for Mass Educaton and Preventive Remedies

The practice of *mahr* among Muslims, as is revealed by the present study, is not conscious, enthusiastic and honest upto the level of expectation. Its significance is not well understood by them. Such a negligent approach towards *mahr* and other aspects of Islamic law leads to unpleasant happenings and injustice by way of deprivation. This further gives an opportunity to the biased writers to present an ugly picture of Islamic law and Muslim society. This is basically due to ignorance of Muslims in general and women in particular about the Divine character, moral significance, social purpose and legal necessity of *mahr* and its sister institutions, *nafaqah* and *mata'*. Therefore, there is a need for mass education about the principles of Islamic law. Women in particular, are to be educated about the actual concept and working of the institution of *mahr* and the related laws.

Besides proper education policy following preventive measures may be adopted to make the working of the institution of *mahr* efficient and just:

(1) The institution of *qadis'* be established and Islamically educated persons with requisite knowledge of the principles of Islamic jurisprudence must be associated with this. The parties must have direct access to the *qadis'* courts.

(2) The use of un-Islamic terminology in Islamic law must be abandoned.

(3) The decision making in personal law matters must take place squarely under the principles of Islamic law and only fair use of analogies must be allowed.

(4) Deviations in the present practices and precedent from the spirit of the institution of *mahr* must be sufficiently taken note of.

(5) The printed *nikahnamas* and *kabinnamas* available in the market and in common use nowadays need to be thoroughly revised and standardized with careful scientific modulation.

(6) *Mahr* as a necessary effect of Muslim marriage must be well distinguished from customary payments like *zewar, thān* etc.

(7) *Mahr* must be actually handed over to the wife.

(8) Reasonable amount of *mahr* be fixed with the free consent of both the parties. Bride's consent as is usually not being sought, must be obtained after due deliberations with her.

(9) *Mahr* must be considered as a symbol of honour and not as a mere economic benefit to the wife or a coercive measure for preventing *talaq* which become a cause for excessive fixation of *mahr*. The experience has shown that the exorbitant *mahr* has never served the purpose for which it was fixed, instead, has dragged the parties to the litigation with no or little gains.

(10) Usually higher *mahr* is being fixed in the cases where parties to the marriage lack mutual trust and confidence and are in a state of doubt and suspicion. To avoid such a situation, the doctrine of *kufu*, with special emphasis on moral attitude, ethical consciousness, social behaviour and intellectual attainments of the parties to the marriage, must be followed.

(11) Generally the payment of *mahr* must be prompt as is demanded by its nature. Its payment may be deferred only when demanded by exceptional circumstances and expressible reasons.

(12) Where no separate mention of prompt and deferred *mahr* has been made, whole of the *mahr* must be deemed to be payable on demand.

(13) Regarding refusal of conjugal rights for non-payment of prompt *mahr* the Imam Abu Hanifa's view must be followed and the decision of Allahabad High Court in *Abdul Kadir* (1886) be overruled. The wife must be given a right to refuse society to the husband for non-payment of prompt *mahr* even if consummation of marriage has taken place.

(14) So far as the disputes about relinquishment of *mahr* are concerned the *futwa* of Hazrat Umar(R.A.) must be adopted. If the lady, after the relinquishment of her *mahr* claims it again she must be paid that because to demand it again means that she had not surrendered it willingly. However, it may be pointed out that if the wife does not claim it again during her life time her heirs be not given such right.

(15) Where a girl contracts her marriage for inadequate *mahr*, proper *mahr* be made payable to her on consummation of marriage. If she really intends to agree to a lower *mahr*, she can remit a part of it later after marriage. Same principle may be followed where a Shia grandfather has exercised his power of abatement of *mahr*.

(16) For the purposes of "widow's right of retention", the term possession must be given a liberal interpretation and a widow, if living with her husband till his death, be deemed to be in possession of a reasonable portion of his house property even after his death.

(17) The "widow's right of retention" must be treated as heritable. There is no harm in holding it also as transferable, though the doctrine of *Shufa* needs to be adhered to in this case strictly.

(18) On divorce *mahr, nafaqah* and *mataʿ* must not be confused for one another, but the enforcement of unpaid-*mahr, nafqah* due under *Shariah* and the *mataʿ* must be ensured as separate claims.

(19) Where dissolution of marriage takes place before its consummation half of the *mahr* (where *mahr* was fixed) or only *mataʿ* (where *mahr* was unspecified) is due to the divorcee. In some

cases it has been observed that the marriage breakdown takes place immediately after some days of marriage. In such cases, the woman to save her image of virginity, does not claim that the marriage has got consummated when it has actually so happened. She, therefore, loses her right to *mahr*, just to save her particular image for obvious reasons. In view of this fact it is suggested that whenever the wife resides in the matrimonial home (where husband also resides) for a reasonable period of time, full *mahr* must be made payable to the wife. In other words, the concept of *khalwat-i-sahihah* must be given an extended meaning. However, the dissolution of marriage should not have taken place on account of the impotency of the wife. In such cases the women should not claim *mahr*. But, if the husband has sufficient means he must offer full *mahr*. It is for this and other similar reasons that the Quran has advised the "remission" of his or her part of *mahr* by each spouse, as discussed in Chapters IVand V of this study.

(20) The entitlement to *mahr*, of a divorced woman under judicial divorce may be determined as per the analysis of the Kazimi Act for the said purpose in chapter VII of this study.

4. *Special suggestions for Kashmir Valley and like situations*

Besides the above mentioned preventive measures to stop misuse and exploitation of laws relating to *mahr* following additional measures are suggested for improving the working of the institution of *mahr* in Kashmir Valley and places with similar situations:

(1) The Jammu and Kashmir Muslim Dower Act, 1920 be replaced by a complete and balanced statute on *mahr* in conformity with the rules of *Shariah*.

(2) The copies of the statutes must be made available at local levels also.

(3) *Mahr* must be fixed only after the consent of the bride as to the subject matter and quantum of *mahr*. Statutory guarantee must be given in this respect.

(4) *Mahr* in the interest of the wife, must not be fixed in terms of a cow, a sheep, a tree or the like, though these are lawful subjects of *mahr*. It is preferable to stipulate *mahr* in terms of money or gold or silver.

(5) No customary exchange of so-called gift properties between the families of the bride and the groom must take place before proper *ijab* and *qabul* and fixation or payment of *mahr*, as the case may be.

(6) At the time of *nikah* it must be made clear to the wife that how much *mahr* has been fixed and what are the items constituting customary payment like *thān* or *zewar*.

(7) Wherever presently the *nikah* is being performed verbally only, *nikahnamas* must be introduced forthwith to reserve a record of marriage and its terms and conditions.

(8) Whole of the *mahr* must be, as a general rule, made payable on demand. The present trend of paying *mahr* at the time of performance of *nikah* needs an encouragement.

(9) *Dukhtarani Khananishin* who usually do not claim *mahr* from their husbands(*Khanadamads*) must be offered *mahr* and those must not be deprived of *mahr* as a rule.

(10) The widows must be given their unpaid *mahr* and should not be deprived of that by making arrangements for their mere maintenance from husband's property or by his heirs.

(11) Divorcees' right to *mahr* needs special protection. Those divorcees who are alleged to have been responsible for marriage breakdown usually do not claim the unpaid *mahr*, probably due to simplicity or ignorance. Such women need a security of full rights by legislation which must be granted to them.

(12) Since customary practices in Kashmir are not certain and most of these are unreasonable so *Shariah* must be taken as the rule of decision under Sri Pratab J&K Laws Consolidation Act, 1977 B(1920 AD). Uncertain and unreasonable customs have no value of law.

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ABBREVIATIONS

A.I.R	All India Reporter
A.S.I.L.	Annual Survey of Indian Law
All.L.J.	Allahabad Law Journal
Bom.	Bombay
C.P.C.	Civil Procedure Code
Cal.	Calcutta
Cal. W.N.	Calcutta Weekly Notes
D.B.	Division Bench
H.C.	High Court
I.A.	Indian Appeals
I.C.	Indian Cases
I.L.R.	Indian Law Reports
I.C.L.Q	Islamic and Comparative Law Quarterly
I.C.L.R.	Islamic and Comparative Law Review
IR	Indian Rupees
J&K L.R.	Jammu & Kashmir Law Reporter
J.I.L.I.	Journal of the Indian Law Institute
Lah.	Lahore
M.I.A.	Moore's Indian Appeals
Mad.	Madras
P.C.	Privy Council
P.L.D.	Pakistan Legal Decisions
Pat.	Patna
Q.B.	Queen's Bench
R.A.	*Radiyallahu Anhu, Rahmatullahi Alaih*
S.A.W.	*Sallallahu alihi Wasallam*
S.C.C.	Supreme Court cases
S.C.R.	Supreme Court Reporter
Smv.	Samvat era
So.Sh.	Somalian Shilling
T.P.Act	Transfer of Property Act.

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